Natomi Hospitals of California, Inc., d/b/a Good Samaritan Hospital, San Jose Medical Center, and South Valley Hospital *and* California Nurses Association. Cases 32–CA–16219, 32–CA–16221, 32–CA–16330, 32–CA–16404, and 32–CA–16405

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On May 4, 1999, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief. The Charging Party filed an answering brief in support of the General Counsel's cross-exceptions. The Respondent filed an answering brief in opposition to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. This proceeding involves the Respondent's unilateral implementation in the summer of 1997 of staffing matrix changes for registered nurses and other employees working in the transitional care, rehabilitation, and medical/surgery units at the San Jose Medical Center, and in the mother-baby and medical/oncology units at Good Samaritan Hospital. The staffing matrix essentially determines the number of employees to be used on a shift based on the patient census of a particular unit. All of the nurses in these hospital units are part of a single bargaining unit represented by the Union. It is undisputed that the Respondent refused to bargain with the Union about the new matrices and their implementation. The Respondent claimed that the management-rights provision in the parties' collective-bargaining agreement privileged its unilateral actions.

The judge found that the management-rights clause in the collective-bargaining agreement between the Respondent and the Union did not operate as a waiver of the Union's right to bargain over the Respondent's decision to implement new staffing matrices. The Respondent has excepted to this finding. For the reasons stated below, we find merit in this exception, and conclude that the Respondent was not obligated to bargain about its decision.[2]

The judge correctly framed the inquiry as involving the question whether the contractual language at issue constituted a clear and unmistakable waiver of the Union's right to bargain. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The management-rights provision in question reads, in pertinent part, as follows:

> SECTION 1. IN GENERAL Except as specifically abridged by express provision of this Agreement, nothing herein shall be interpreted as interfering in any way with the Hospital's right to determine and direct the policies, modes, and methods of providing patient care, to decide the number of employees to be assigned to any shift or job, or the equipment to be employed in the performance of such work, to employ registry or traveling nurses when necessary to supplement staffing, to float employees from one working area to another working area within the division in which they are qualified to work, or to determine appropriate staffing levels. Thus, the hospital reserves and retains, solely and exclusively, all the rights, privileges and prerogatives which it would have in the absence of this Agreement, except to the extent that such rights, privileges and prerogatives are specifically abridged by express provisions of this Agreement. . . .
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> SECTION 2. ELABORATION OF RIGHTS In expansion rather than in limitation of the foregoing Section A, the Hospital shall have the following unilateral rights: (A) To determine the number, location, and types of facilities; (B) To subcontract any of the work or service; (C) To select, hire, and train employees, and to discipline and discharge employees for just cause; (D) To adopt, add to, amend, change or rescind any reasonable Hospital work rules.
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> SECTION 3. NOTICE OF SUBCONTRACTING/DISCONTINUANCE OF SERVICE The Hospital agrees to

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Chairman Hurtgen and Member Truesdale agree with respect to the result on this issue. Although Chairman Hurtgen would apply a different standard for analysis of the waiver issue, for the reasons set forth in his separate opinion in this case, he agrees that there was a waiver even under the Board's current "clear and unmistakable" standard. Member Walsh dissents for the reasons set forth in his separate opinion.

> give the union thirty (30) days advance notice . . . of its intention to subcontract any work being performed by bargaining unit employees. . . .

Focusing particularly on the phrases "to decide the number of employees to be assigned to any shift or job" and "to determine appropriate staffing levels," the judge found, and we agree, that the implementation of staffing matrices was encompassed by the language of section 1 of the management-rights clause. He nevertheless found that section 1 did not operate as a clear and unmistakable waiver of the Union's right to demand bargaining whenever the Respondent implemented a new staffing matrix.

The judge reached this conclusion largely because, unlike section 1 of the management-rights clause, section 2 contained the words "unilateral rights." He found that this difference created an ambiguity in section 1 of the clause. Thus, the judge reasoned that the Respondent had signified to the Union its intent that the management rights enumerated in section 2, unlike those in section 1, be understood by the Union as paramount to the Respondent's operations and as rights over which there existed no obligation to bargain. The judge therefore found that, viewing the management-rights clause as a whole, the wording of section 1 did not support a view that, by agreeing to the section 1 management rights, the Union clearly and unmistakably waived its right to bargain. After also rejecting the Respondent's argument that the parties' negotiations over the management-rights clause demonstrated a waiver by the Union of the right to bargain over the implementation of new staffing matrices, the judge found the Respondent's unilateral implementation unlawful.

Contrary to the judge, we find that the parties' agreement demonstrates a clear and unmistakable waiver of the Union's right to bargain over the decision to make the staffing level changes at issue here. We find that the judge attributes undue significance to the inclusion of the phrase "unilateral rights" in section 2 but not in section 1. The meaning of section 1 as it pertains to the staffing level changes is plain: "Except as specifically abridged by express provision of this Agreement, nothing herein shall be interpreted as interfering in any way with the Hospital's right . . . to decide the number of employees to be assigned to any shift or job . . . or to determine appropriate staffing levels." Moreover, section 1 reserves these rights for the Respondent "solely and exclusively." Although section 1 does not contain the phrase "unilateral rights," it does say that Respondent can take the listed actions unless it is prohibited from doing so by an express provision of the contract. Clearly, there is no such provision.

Our dissenting colleague says that the actions set forth in section 2 can be unilateral, i.e., they can be accomplished without bargaining. By contrast, he says, the actions in section 1 can only be accomplished after bargaining. Thus, in his view, section 2 is more expansive than section 1, and section 1 covers the actions here. However, this analysis ignores the fact that the section 1 actions are not to be interfered with "in any way." That is, neither the contract *nor anything else* is to limit Respondent's freedom to act. In view of such language, the use of the additional term "unilateral" is unnecessary.

Finally, our colleague focuses on certain negotiating history concerning section 3 of the management-rights clause. However, that section deals with subcontracting. That is not involved here.

For these reasons, we find that the management-rights clause operated as a clear and unmistakable waiver of the Union's right to bargain over the Respondent's decision to implement new staffing matrices for bargaining unit employees in all five hospital units at issue. We therefore reverse the judge's finding that the Respondent's refusal to bargain about that decision was unlawful.

On the other hand, we find that there was no waiver of the Respondent's obligation to bargain about the effects of its decision to implement new staffing matrices. Contractual language waiving a Union's bargaining rights as to a certain decision does not constitute a waiver of the right to bargain over that decision's effects. Even when the employer has no statutory obligation to bargain regarding a business decision because it does not involve "wages, hours, and other terms and conditions of employment" under Section 8(d), the Board has found a duty to bargain over effects.

> An employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself.

KIRO, Inc., 317 NLRB 1325, 1327 (1995), citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). Although in the present case we have found that the Respondent is not obligated to bargain concerning its decision based on the Union's waiver, rather than because the decision does not fall within the statutory scope of bargaining, the principle remains the same. In the absence of a clear and unmistakable waiver by the Union concerning effects bargaining, such bargaining is still required. We find no clear and unmistakable waiver as to effects bargaining in this case.

2. We agree with the judge that the Respondent unlawfully refused to bargain about the effects of its decision in the medical/oncology and medical/surgery

units.[3] We disagree with the judge's finding that the Respondent did not also commit an "effects" bargaining violation in the rehabilitation unit.[4]

On July 8, 1997, Union Representative Maria Elena Cortez sent a letter to Respondent official Fred Bernal that stated, in pertinent part:

> Please be advised that [CNA] is exercising its right to engage in decision and effects bargaining over the recently implemented matrix changes in the Rehab and Med-Surg Unit at San Jose Medical Center.
>
> In preparation for the meeting, please provide the following information:
>
> 1. Copies of the old and new matrices
> 2. If there was reduction in the patient care hours in either unit, the documentation that support the reduction
> 3. Copies of the current acuity system
> 4. The patient census for each unit, by shift, from June 1996 to the present
> 5. Copies of the work schedules for each unit from June 1996 to the present
> 6. The amount of overtime hours worked for each unit, broken down by RN, by shift, from June 1996 to the present.

On July 9, Cortez sent another letter to Bernal with a similar bargaining demand and information request for the medical/oncology unit. As previously stated, the Respondent refused to bargain about the decision or the effects of the matrix change in all units, and it refused to provide the requested information.

The judge found that a proven effect of the staffing matrix changes was to increase the duties and responsibilities of the unit nurses in the medical/oncology and medical/surgery units. He therefore found, and we agree, that the Respondent unlawfully refused to bargain over the effects of the matrix changes in these two units.

Unlike in the medical/oncology and medical/surgery units, however, the judge found that there did not appear to be any record evidence regarding whether the staffing matrix change had any effects on the terms and conditions of employment of the registered nurses in the rehabilitation unit. Finding no evidence of any actual effects, the judge concluded that the Respondent did not unlawfully fail and refuse to bargain. We disagree.

By concluding that there were no effects of the matrix change requiring bargaining in the rehabilitation unit, the judge seemingly ignored evidence recited in his own decision and essentially prejudged the results of the bargaining required. Thus, the judge had found that the number of registered nurses at certain patient census levels on the day shift was reduced (which suggests that each of the fewer nurses had to shoulder a greater share of the usual nursing duties), that, with fewer assistants available, the nurses also had to perform duties normally performed by other nonunit employees, and that the nurses had difficulty providing the mandated level of patient care. Despite these findings, the judge determined that there was no evidence as to any effects of the implementation of the new staffing matrix on the terms and conditions of employment of the registered nurses.

The judge's reasoning is both factually and legally flawed. As discussed above, there is evidence that the staffing matrix changes had an actual adverse impact on rehabilitation nurses' workloads and on their ability to meet mandatory performance standards. Furthermore, had the Respondent not refused the Union's demand for effects bargaining, the ensuing negotiations would presumably have permitted a full exploration of the ramifications of the staffing matrix change. Uncertainty as to the possible effects of policy changes is not unusual, particularly before the parties explore the issue through bargaining. Moreover, the obligation to provide the Union notice and an opportunity to bargain about effects is not conditioned on the view of the judge or the Board as to what, if any, effects will be identified or how they will be resolved by the parties. Rather, it is a statutory duty that must be fulfilled in all but the most exigent circumstances. Accordingly, we find that the Respondent unlawfully failed and refused to engage in effects bargaining as to the rehabilitation unit.

Our concurring colleague agrees, for the reasons set forth in his separate opinion, that the Respondent committed an "effects bargaining" violation with respect to the three units at issue. In his view, however, the Respondent's bargaining obligation would not extend to any changes that are the inherent effects of its lawful decision to implement new staffing matrices. We disagree.

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[3] The judge also found that the Union had failed to request bargaining about the effects of its staffing matrix change for the mother-baby unit at Good Samaritan Hospital and for the transitional case unit at the San Jose Medical Center. Absent exceptions, we adopt pro forma the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) by failing to engage in effects bargaining for these units.

We agree with the judge, for the reasons set forth in his decision, that the Respondent committed a separate 8(a)(5) violation by unilaterally changing the job duties and responsibilities of the registered nurses who work as charge nurses in the transitional care unit. We note that there is no claim that the charge nurses had supervisory authority within the meaning of Sec. 2(11).

[4] For the reasons set forth in his separate opinion, Chairman Hurtgen concurs in finding "effects" bargaining and related information request violations with respect to bargaining unit nurses in these three hospital units.

We note initially that the Respondent does not make this argument in its defense. Furthermore, if it had raised this defense, it would bear the burden of proving it. Specifically, it would be the Respondent's burden, not the General Counsel or Union's, to show more than that all effects of the Respondent's staffing matrix decision were the direct or inherent result of the decision. The Respondent had an obligation to bargain about effects, on the Union's request, as long as there were alternatives that the parties could explore without calling into question the Respondent's underlying, nonbargainable decision. See, e.g., *Bridon Cordage, Inc.*, 329 NLRB No. 35 (1999). The Respondent has made no showing here that there are no bargainable alternatives.

Our colleague's further conclusion that the Respondent unlawfully refused to provide the Union with the requested bargaining information regarding the medical/oncology, medical/surgery, and rehabilitation unit nurses is premised on his view that the Respondent committed "effects bargaining" violations for the narrow reasons set forth in his separate opinion. As discussed above, we find that the Respondent had an obligation to bargain about the effects of its staffing matrix decision in each of these units. We therefore find that the Respondent violated Section 8(a)(5) by refusing to provide the information requested in the Union's July 8 and 9 letters.[5]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of its decision to implement new staffing matrices in its rehabilitation, medical/surgery, and medical/oncology units, we shall order the Respondent, on request, to bargain with the Union concerning the effects of its decision.

We shall also require the Respondent to supply the Union with the information requested in connection with the Union's request to bargain over the matrix changes in the Respondent's rehabilitation, medical/oncology, and medical surgery units. Finally, we shall order the Respondent to rescind the changes implemented concomitantly with the new staffing matrix in June or July 1997 in the job duties and responsibilities of the registered nurses who act as charge nurses in the transitional care unit at San Jose Medical Center.

ORDER

The National Labor Relations Board orders that the Respondent, Natomi Hospitals of California, Inc., d/b/a Good Samaritan Hospital, San Jose Medical Center, and South Valley Hospital, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union with respect to the effects on its unit employees of its decision to implement new staffing matrices in its rehabilitation, medical/oncology, and medical/surgery units.

(b) Changing the job duties and responsibilities of the registered nurses in the Respondent's transitional care unit.

(c) Failing and refusing to furnish the Union with information necessary and relevant for the purpose of preparing for bargaining regarding the effects of the Respondent's decision to implement new staffing matrices.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the effects on the unit employees of the implementation of new staffing matrices in the Respondent's rehabilitation, medical/surgery, and medical/oncology units, and reduce to writing and execute any agreement reached as a result of such bargaining.

(b) Rescind the changes made in June or July 1997 in the job duties and responsibilities of the registered nurses in the Respondent's transitional care unit.

(c) Furnish the Union with information which is necessary and relevant for the purpose of preparing for bargaining about the effects of the Respondent's decision to implement new staffing matrices.

[5] We note that all of the information requested appears to relate directly to the terms and conditions of employment for bargaining unit employees. As such, it is presumptively relevant to the Union's representative role. See, e.g., *Beverly Health Care & Rehabilitation Services,* 328 NLRB 885 (1999). Although we need not decide the matter, it would appear that the Respondent had an obligation to provide the requested information even apart from its relevance to effects bargaining.

We further note that the judge's finding of an unlawful refusal to provide information was based on his finding that the Respondent had an obligation to bargain about its decision to make changes in the staffing matrices. He found no need to order the Respondent to provide the requested information in light of his remedial recommendation that the Respondent rescind its matrix changes. As discussed above, we have found that the Respondent had no decisional bargaining obligation. We therefore do not adopt the judge's rescission recommendation. We have found that the Respondent unlawfully failed to engage in "effects" bargaining and to provide information requested by the Union that is relevant to such bargaining, for the rehabilitation, medical/oncology, and medical surgery units. We shall therefore order that the Respondent take the standard affirmative remedial action of providing this information.

(d) Within 14 days after service by the Region, post at its above-named three hospitals in San Jose, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director of Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained by it for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, concurring.

I agree that the Respondent was not obligated to bargain about its decision to implement new staffing matrices, and therefore did not violate Section 8(a)(5) and (1) of the Act by refusing to bargain about that decision. However, I do not agree that the judge correctly framed the inquiry as involving the question whether the contractual language at issue constituted a clear and unmistakable waiver of the Union's right to bargain. As I stated in my separate opinion in *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999), I would apply the "contract coverage" analysis, set forth by the D.C. Circuit in *NLRB v. Postal Service*, 8 F.3d 832 (1993), to determine the legality of the Respondent's actions.

Here, the Respondent had the right, inter alia, "to decide the number of employees to be assigned to any shift or job" and "to determine appropriate staffing levels." Clearly, the judge was correct in finding that the management-rights clause encompassed the implementation of staffing matrices. Thus, the decision to implement the new matrices was "covered by" the contractual language relied on by the Respondent. Further, I agree with my colleagues' analysis of the specific language of the clause as it pertains to the Respondent's decision to implement the new staffing matrices. I therefore conclude that the Respondent was privileged to implement them.[1]

I agree with my colleagues that a contractual provision which privileges a unilateral decision does not necessarily privilege a refusal to bargain about the effects of the decision. However, where, as here, there are "effects" which are inherent in the decision itself, the contractual privilege regarding the decision will apply with equal force to the effects. In the instant case, the decision to change the matrices had the "effect" of reducing the number of nurses relative to patient nurses. But this "effect" was encompassed by the management-rights clause which gave Respondent the right to "decide the number of employees to be assigned to any shift or job" and "to determine appropriate staffing levels."

Thus, the decision to change the matrix, and the consequential reduction in the number of nurses relative to patient census, were both lawful. However, these changes themselves had potential effects on the nurses, e.g. increased and/or changed job duties. To the extent that there were such effects, I agree that they were bargainable on request.[2] Accordingly, I agree with my colleagues that the Respondent refused to bargain about the effects in the rehabilitation unit, the medical/oncology unit, and the medical surgery unit.

Finally, I agree that there was a duty to furnish information as to those units where there were "effects" and a union request for bargaining concerning such effects.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I recognize that my "contract coverage" analysis is not current Board law, although it does have court support. See my opinion in *Dorsey Trailers*, supra. In the instant case, I agree with my colleagues that, even under a "clrear and unmistakable waiver: analysis, the decision at issue was lawful.

[2] I agree that the contract did not privilege a refusal to bargain about effects. However, I reach this conclusion on a "contact coverage" analysis, rather than a "waiver" analysis. The contract does not cover matters involving the effects of a change in the matrix or the effects of a change in the number of nurses.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

My colleagues find that the management-rights clause of the parties' collective-bargaining agreement operated as a clear and unmistakable waiver of the Union's right to bargain over the Respondent's decision to implement new staffing matrices. For the reasons set forth below, as well as in the administrative law judge's decision, I respectfully disagree and would find that the Respondent's unilateral implementation of new staffing matrices violated Section 8(a)(1) and (5) of the Act.

The relevant language of the management-rights clause is set forth by my colleagues. Initially, I agree with my colleagues that the implementation of staffing matrices is encompassed by the language of section 1 of that clause. I do not agree, however, that the Union clearly and unmistakably waived its right to bargain over the enumerated rights contained in section 1. The majority relies in large part on language in section 1 providing that, except for express provisions of the contract, nothing "shall be interpreted as interfering in any way" with the Respondent's enumerated rights. Section 2 of the management-rights clause, however, provides that the four rights specified in that section are "unilateral." Although the majority focuses on the "in any way" language of section 1, I find it more telling that the rights listed in section 1 were not similarly termed "unilateral." Assuming that the term "unilateral" in section 2 must be given some meaning, I am compelled to conclude that the Union did not clearly and unmistakably agree to not even subject to bargaining. The Respondent may act unilaterally regarding the four enumerated section 2 rights, which is a more expansive right than retained for the subjects covered by section allow the Respondent to take unilateral action with regard to the subjects enumerated in section 1.

The Respondent has conceded that the rights contained in section 2 were those it considered to be the most important. Moreover, although the Respondent initially placed the implementation of staffing matrices in section 2, it later agreed to move them to section 1. This bargaining history suggests that the Union was willing to concede that the implementation of staffing matrices was a management right, albeit not a unilateral one. The majority's rationale is flawed inasmuch as it provides no explanation for the purpose of the term "unilateral" in section 2.

As to the meaning of "in any way," I find the bargaining history of section 3 of the clause to be illuminating. The Respondent's initial section 3 proposal provided that the reserved management rights would not be subject to the grievance and arbitration provisions of the agreement, and that the Respondent was not required to bargain with the Union over any reserved rights. The Union sought to and succeeded in eliminating the grievance/arbitration/bargaining language from the contract clause, suggesting it wanted and did not clearly waive such rights with regard to all of the enumerated management rights. Given this history, I find that the "in any way" language of section 1 cannot be read to constitute a waiver of the Union's right to bargain over those enumerated rights. I agree that, except for the bargaining right preserved by the Union, the Respondent cannot be restrained in any way from exercising its management rights. Thus, although the Respondent is obligated to bargain with the Union before making any changes, it is not precluded from making changes once it has met its bargaining obligation.[1] The use of the term "unilateral" in section 2, however, relieves the Respondent of any bargaining obligation for those enumerated rights.

The majority also relies on the initial phrase of section 2, which provides that its enumerated rights are "in expansion rather than in limitation" of the section 1 rights, to find that the section 1 rights carry no obligation to bargain. They contend that the judge's analysis gives the section 2 language a limiting effect, in direct opposition to the literal language of the words. Their view, however, is premised on a misreading of the breadth of the rights encompassed by section 1. When the subjects covered by section 1 are properly viewed as being rights reserved to management subject to an obligation to bargain over any changes with the Union, section 2 expands the Respondent's rights by providing that certain topics are 1.

The implementation of changes in staffing matrices falls within section 1 of the management-rights clause. Accordingly, I would find that the Respondent was obligated to bargain over such changes in staffing matrices, and its unilateral implementation of such changes violated Section 8(a)(1) and (5) of the Act.

[1] This is the only logical meaning of the sentence of sec. 1 which states that the Respondent reserves "all the rights, privileges and prerogatives which it would have in the absence of this Agreement." For, "in the absence of this Agreement," the Respondent clearly would not have the "right, privilege, and prerogative" to act unilaterally on a mandatory subject of bargaining such as staffing levels, without bargaining to agreement or impasse with the Union.

Dated, Washington, D.C. August 27, 2001

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with the California Nurses Association (CNA) with respect to the effects on unit employees of our decision to implement new staffing matrixes for employees in the medical/oncology units at Good Samaritan Hospital and the rehabilitation and medical/surgery units at San Jose Medical Center.

WE WILL NOT change the job duties and responsibilities of the registered nurses in the transitional care unit at San Jose Medical Center.

WE WILL NOT fail and refuse to furnish the CNA with documents, which are necessary and relevant for the purpose of bargaining regarding the effects of our decisions to implement new staffing matrices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the CNA concerning the effects on unit employees of the implementation of new staffing matrices in our rehabilitation, medical/surgery, and medical/oncology units, and reduce to writing and execute any agreement reached as a result of such bargaining.

WE WILL rescind the changes made in June or July 1997 in the job duties and responsibilities of the registered nurses in our transitional care unit.

WE WILL furnish the CNA with information necessary and relevant for the purpose of preparing for bargaining about the effects of our decision to implement new staffing matrices.

NATOMI HOSPITALS OF CALIFORNIA, INC., D/B/A GOOD SAMARITAN HOSPITAL, SAN JOSE MEDICAL CENTER, AND SOUTH VALLEY HOSPITAL

Valerie Hardy-Mahoney, Esq., for the Acting General Counsel.

Glen H. Mertons, Esq. (Ford & Harrison, LLP), of Los Angeles, California, for the Respondent.

James E. Eggleston, Esq. and *W. Jane Lawhon, Esq.*, of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The original and first amended unfair labor practice charges in Case 32–CA–16219 were filed by California Nurses Association (CAN) on July 11 and 17, 1997, respectively; the original and first amended unfair labor practice charges in Case 32–CA–16221 were filed by CNA on July 11 and 16, 1997, respectively; the unfair labor practice charge in Case 32–CA–16330 was filed by CNA on September 5, 1997; the unfair labor practice charge in Case 32–CA–16404 was filed by CNA on October 8, 1997; and the unfair labor practice charge in Case 32–CA–16405 was filed by CNA on October 8, 1997. After investigations based on the above unfair labor practice charges, the Regional Director for Region 32 of the National Labor Relations Board (the Board) on October 31, 1997, issued an order consolidating cases and a consolidated complaint, alleging that Natomi Hospitals of California, Inc., d/b/a Good Samaritan Hospital, San Jose Medical Center, and South Valley Hospital (Respondent) was engaging in acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. Thereafter, a trial of the merits of the allegations of the consolidated complaint was held before me in Oakland, California, on March 23–27 and April 9 and 10, 1998. At the trial, all parties were afforded the right to examine and to cross-examine witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The documents were filed by counsel for each party and have been carefully examined by me. Accordingly, based on the entire record, including the posthearing briefs and my observations of the testimonial demeanor of the several witnesses, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a corporation, has been engaged in business in the operation of acute care hospitals in the San Jose, California area, including the Good Samaritan Hospital (GSH) and the San Jose Medical Center (SJMC). During the 12-month period immediately preceding the issuance of the consolidated complaint, in the course and conduct of its above business operations, Respondent derived gross revenues in excess of $250,000 and purchased and received goods and services, valued in excess of $5000, which originated outside the State of California. Respondent concedes that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Counsel for CNA's motion to correct the transcript, which was filed on June 23, 1998, is granted in its entirety.

II. LABOR ORGANIZATION

Respondent admits that CNA is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The consolidated complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain, on request, with CNA concerning changes, which affected its employees who are represented by CNA, in the staffing matrixes for its mother-baby and medical/oncology units at GSH and the effects of the changes. The consolidated complaint further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain, on request, with CNA concerning changes, which affected its employees who are represented by CNA, in the staffing matrixes for its rehabilitation and medical/surgery units at SJMC and the effects of the changes. The consolidated complaint next alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to provide relevant and necessary information relating to the aforementioned changes, which were implemented by Respondent, to CNA, which had requested the information. The consolidated complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain, on request, with CNA concerning certain changes affecting its employees who are represented by CNA, including changes affecting their job responsibilities and the number and acuity of their patients, in the transitional care unit at SJMC and the effects of the changes..[1] Respondent admitted that it implemented the aforementioned changes in the terms and conditions of employment of certain of its employees, who are represented for purposes of collective bargaining by CNA, unilaterally and without affording CNA an opportunity to bargain over the changes or their affects on the bargaining unit employees and that such were mandatory subjects of bargaining. However, in its defense, Respondent contends that the language of the management-rights clause in its existing collective-bargaining agreement with CNA constitutes a waiver of the latter's statutory right to bargain over the changes. Counsel for the Acting General Counsel and counsel for the Charging Party reject this contention.

[1] Counsel for the Acting General Counsel and counsel for the Charging Party contend that the consolidated complaint paragraphs, which refer to the mother-baby and the medical/oncology units at GSH and the rehabilitation and medical/surgery units at SJMC should be read as expansively as the paragraph regarding the alleged unlawful changes affecting the transitional care unit employees at SJMC. However, the wording of pars. 7(a), 9(a), and 10(a) makes it clear that the only alleged unlawful change, which was contemplated by the Regional Director for Region 32 for each of the paragraphs, was the change in the staffing matrix and nothing more. Counsel for the Acting General Counsel was afforded ample opportunities to seek to amend the consolidated complaint to reflect her broad reading of the above paragraphs, but she declined to do so. Accordingly, as I advised the parties, pars. 7, 9, and 10 of the consolidated complaint shall be construed as alleging only the implemented staffing matrix change as being unlawful. More specifically, as such affected the bargaining unit employees, who are represented by CNA for purposes of collective bargaining, the issue concerns the legality of Respondent's implemented changes, if any, in the numbers of registered nurses and the effects of the changes on the bargaining unit.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The refusals to bargain

Respondent has owned and operated GSH, SJMC, and South Valley Hospital, all of which are located in the San Jose, California vicinity, since approximately 1996. The record establishes that CNA represents, for purposes of collective bargaining, a unit consisting of all regularly scheduled full-time and regularly scheduled part-time registered nurses, including skilled nursing facility nurses and endoscopy nurses, employed by Respondent at the above-stated acute care hospitals;[2] that CNA and Good Samaritan Health Systems, Inc., the predecessor employer to Respondent, had a long-standing collective-bargaining relationship, with the final collective-bargaining agreement between them effective until June 30, 1996; and that CNA and Respondent are parties to a collective-bargaining agreement, effective from July 25, 1996, until June 30, 1999, covering the registered nurses (RNs) at the above three hospitals. The parties stipulated that GSH has a licensed bed capacity of 533, that SJMC has a licensed bed capacity of 348, and that South Valley Hospital has a licensed bed capacity of 93. The record further establishes that Good Samaritan Health Systems, Inc. determined, and Respondent continues to determine, the numbers of RNs and other classifications of employees[3] to be utilized on any given shift in any unit in the above three hospitals by means a mechanism, referred to as a staffing matrix, and that, almost entirely, staffing matrixes utilize the patient census in a unit as the relevant factor in determining the required staffing for a given shift in a hospital unit.[4] On May 27, 1997, Tom May, Respondent's president and CEO, distributed the following memorandum to each of Respondent's employees at the above three hospitals:

> As many of you know, there has been a renewed effort over the past few weeks at each hospital . . . to examine ways to achieve additional efficiencies in our operations. These actions have resulted in some reductions in staff and adjustments to staffing matrixes, both in clinical and nonclinical ar-

[2] Excluded from the bargaining unit are admitting, in-service, utilization review, infection control, enterostomal therapy, cardiac, catheterization laboratory, diabetic education coordinator, respiratory therapy nurses, radiation therapy nurses, and stroke coordinator nurses, quality assurance, employee health, RN's who are employed and perform 75 percent of their time on functions directly related to the cardiology department, all other employees, guards, and, except as herein provided, supervisors as defined in the Act.

[3] Other than RNs, these non-bargaining unit employee classifications include licensed vocational nurses (LVNs), technical associates or certified nursing assistants (aides), ward clerks, and housekeepers.

[4] There exists record evidence that staffing in other hospitals is accomplished on an ad hoc, day-to-day basis or by acuity-based systems, which determine staffing levels based on the degrees of patient illnesses in a given unit; however, there is no record evidence that, at any time material herein, Respondent utilized any means other than the staffing matrix for calculating staffing levels in the different units at its three hospitals. Moreover, while there is record evidence that patient acuity is a factor for staffing in some units, such as the mother-baby unit at GSH, the record evidence is that the daily patient census in a unit is the predominant staffing factor, which is utilized by Respondent in its staffing matrixes.

> eas. I would like to explain to you why this effort has been necessary and to enlist your support continuing to do the outstanding job that you do each day—even through some continuing difficult challenges. Why are we making these changes? [Respondent] routinely reviews how the organization is performing in reference to its annual goals, including finance and quality targets. Some pieces of the financial review are based upon estimates and historical trends. . . . Throughout 1996, we were operating under the previous financial information systems, while our new systems were being installed. Recently, with the increased accuracy available due to the conversion to the Meditech systems, we identified some necessary changes that help to better estimate hospital revenue. . . . We have reviewed the estimates of projected revenue expected from payers and believe that revenues will continue to be pressured as managed care and other payers tighten down reimbursement. The renewed effort to operate more productively is aimed at bringing operations to a financial level that will ensure long term financial strength while retaining unyielding commitment to clinical and service quality. . . .

At issue here are unilateral staffing matrix changes by Respondent presumably designed to enable it to "operate more productively."

The mother-baby unit at Respondent's Good Samaritan Hospital is located on the fifth and sixth floors of that facility and has a capacity of 58 beds for patients, which include mothers and their babies and women with gynecological illnesses. The record reveals that, under the staffing matrix which was in effect as of May 1, 1997, staffing was determined by both patient census and patient acuity, and mothers, babies, and gynecological patients were counted separately for purpose of the patient census on a given shift.[5] In late May, a registered nurse in the mother-baby unit telephoned Maria Elena Cortez, a labor representative for CAN, and told her that Respondent was on the verge of changing its staffing matrix in that department including the numbers of RNs and other employees per shift and the method of computation of the patient census per shift. Based on what the nurse reported to her, Cortez sent the following letter, dated May 28, 1997, to Julie Clayton:

> It recently came to my attention that significant changes in working conditions are being considered in the Mother-Baby Unit. Specifically, we understand that [Respondent] intends to implement a new staffing matrix on June 1, 1997. As you may be aware, [CNA] has the legal right to bargain over changes in working conditions prior to implementation of any changes. Please be advised that we are exercising our right in this matter. We are interested in bargaining over these changes prior to their implementation. Please contact me at your earliest convenience to arrange a meeting time. . . .

Respondent admits that it did implement a new staffing matrix for the mother-baby unit at GSH, that it did so without notice to or affording the CNA an opportunity to bargain, that, as such affected the registered nurses' bargaining unit employees, the new staffing matrix constituted a material change in their terms and conditions of employment, and that the subject matter was a mandatory subject of bargaining. With the new staffing matrix, which went into effect on or about June 5, Respondent changed its method for determining the mother-baby unit patient census by counting a mother and her baby as a "couplet" or one patient. According to Cortez, she had a subsequent conversation with Beth Hennessey, the nursing manager of the mother-baby unit, and the latter informed her that this new method of counting mothers and babies enabled Respondent to reduce its required patient care hours for two patients from 8.6 hours for each to 12.6 for the couplet and, thereby, to reduce its staffing levels for all job classifications. Specifically, as to any changes in existing RN staffing levels under the newly implemented matrix, the record establishes that, while there were no RN reductions at some census levels, the new staffing matrix reduced the numbers of scheduled RNs on the day shift for a patient census of 48,[6] on the "p.m." shift for a census of 42 to 44,[7] and on the night shift for a patient census of 42.[8] Given that the normal patient census in the mother-baby unit at the time was approximately 40, it is clear that the reduction in the number of RNs at the above levels represented a material change, and, in this regard, Lisa Mendez, the manager of the mother-baby unit in July 1997, admitted that changing the method of calculating the patient census in order to reduce necessary staffing levels was unprecedented.

On June 14, Fred Bernal, Respondent's director of labor and employee relations, replied, in writing, to Cortez. Referring to language contained in the management-rights provision of the parties' existing collective-bargaining agreement, Bernal stated,

> [T]his section establishes that we did bargain with the CNA in good faith over the right to determine appropriate staffing levels. As a result of those negotiations, the CNA agreed that we have the right to determine appropriate staffing levels. Thus, we have the right to change the staffing matrixes of any department without further need or requirement to bargain over these staffing level changes. Therefore, your request to arrange a meeting to bargain over these current or future staffing level changes is denied.

[5] Julie Clayton, the child services manager for GSH, testified that since, at least, 1990, the staffing matrix for the mother-baby unit has been changed from time to time. Clayton testified that, at the hospital, the term, staffing matrix, is synonymous with staffing. Lisa Mendez, the manager of the mother-baby unit during the summer of 1997, likewise testified that staffing in the unit has always been done "with the matrix and acuity points."

[6] At this census level, under the old staffing matrix, there would be 6RNs working; under the new matrix, assuming a census of 24 mother-baby couplets, there would be 5 RNs working.

[7] At this staffing level, under the old staffing matrix, there were five RNs working. Under the newly implemented staffing matrix, given the census level of 18 to 22 (21 or 22 mother-baby couplets), 4 RNs would be scheduled for work.

[8] For this census level under the old staffing matrix, five RNs would have been scheduled for work. Under the newly implemented staffing matrix, for a census of 20 to 21 (21 mother-baby couplets), 4 RNs would be scheduled on the night shift.

In these circumstances, Respondent admitted that it failed and refused to bargain with CNA over its decision to implement this new staffing matrix in the mother-baby unit.[9]

Respondent operates a transitional care unit (TCU) at the SJMC. There is no dispute that the hospital unit is primarily for cardiac care patients and is a "step down unit from the [intensive care unit]" for those patients who need continual cardiac rhythm monitoring, but, unlike the ICU in which cardiac monitors are located in each patient's room, the TCU monitors are located at a central desk and are continually monitored by ward clerks. It is also not in dispute that there are 24 beds in the TCU; that, during the spring and summer of 1997, the average number of patients in the unit was 16 or 17; that, besides registered nurses, the classifications of employees in the TCU are LVNs, nurses aides, and ward clerks; that, on each of the three hospital shifts, a registered nurse is responsible for four patients; and that, on each shift, on a rotating basis, one RN is chosen to be the charge nurse. According to Maureen Guinnane, a registered nurse in the TCU, this individual is nominally the resource person in the unit—"They are responsible for coordinating the transferring of patients off the unit. They also assist with procedures on the unit as well as assigning the patients that are being admitted to the [TCU]." Also, "they're responsible [for] compiling a charge nurse report that is transferred from shift to shift with the information of the status of the patients and what's going on. They give the continuity of patient care throughout the 24 hour shift." Further, charge nurses are responsible for matters pertaining to the transfer of patients to other hospital units. The latter responsibility involves accompanying the patient for tests, such as treadmill tests, and, depending on the reason for the transfer, could take from 10 minutes to 2 hours if the transfer is to nuclear medicine.

Guinnane testified that, during May 1997, Jeanine Daugherty, the manager of the ICU and TCU units at SJMC, held meetings with the staff of the TCU regarding a new staffing matrix, which Respondent intended to implement for that department,[10] and, on June 11, Daugherty issued a memorandum to all TCU employees, in which she stated that "this matrix must be followed. It is vital to the health of our organization." In the interim between Daugherty's May TCU staff meeting and her June 11 memorandum, Maria Cortez met with the TCU registered nurses during which the nurses informed her of the new staffing matrix and changes, which would result from its implementation, including the charge nurse being in care on a regular basis and the transporting of patients for tests. According to Cortez, she could not recall "if any of [the changes] had yet been implemented. . . . I think they were getting ready . . . my recollection is they already had the new matrix in hand." Immediately thereafter, Cortez testified, she telephoned Daugherty and demanded a meeting to discuss the changes in the registered nurses' working conditions. In turn, the latter demanded specificity as to what Cortez desired to discuss but refused to commit to as to what, if any, changes would be implemented. As a result, on June 10, Cortez sent the following letter to Daugherty:

> It has come to my attention that you are discussing with the nurses several changes in working conditions in . . . TCU . . . . Specifically I understand that you would like to change the charge nurse role in TCU . . . . As you may not know, [Respondent] has a legal obligation to bargain over changes in working conditions with [CNA] *prior to implementation of these changes***.** Please be advised that we are exercising our right to bargain over [this] and any other [change] you may be contemplating in . . . TCU. . . .

Respondent implemented its new staffing matrix for the TCU on or about June 13,[11] and Respondent concedes that it did so without notice to the CNA or affording CNA an opportunity to bargain. Counsel for the Acting General Counsel and counsel for CNA contend that this new TCU staffing matrix not only reduced the number of RNs at certain patient census levels but also, in doing so, changed the job duties and responsibilities of its TCU registered nurses when acting as charge nurses. In this regard, analysis of the prior and new staffing matrixes discloses that, on the 7 a.m. to 3 p.m. shift, at the patient census levels of 4, 8, 12, 16, 20, and 24, the number of required RNs was reduced.[12] Thus, under the old matrix the corresponding RN staffing levels at these census levels were 2, 3, 4, 5, 6, and 7; while, under the staffing matrix, which was introduced on June 13, the corresponding RN staffing levels were 1, 2, 3, 4, 5, and 6.

Guinnane testified that, while under the staffing matrix, which had been in effect prior to June 1997, charge nurses would be assigned to patient care only when "sudden" changes in the TCU's patient census occurred and then no more than "one or two. On a rare occasion it would be up to three" patients, under the new staffing matrix, charge nurses were being assigned a full patient load of four.[13] In her June 11 memorandum to the TCU staff, Daugherty acknowledged this change in the charge nurses' job duties, stating that there would be "times the census would put

[9] Notwithstanding that the consolidated complaint alleged that Respondent failed and refused to bargain over the effects of the matrix change on the registered nurses in the mother-baby unit, I struck testimony regarding the effects of the matrix change in this unit at GSH. In doing so, I noted that Cortez failed to request that Respondent bargain with it over the effects of the matrix change and that the her May 28 letter to Respondent was sent *prior* to the implementation of the new matrix—at a time when Cortez obviously had no knowledge of the effects of the new matrix upon the RNs in the mother-baby unit. Presumably, as concerning the staffing matrix changes in the medical/oncology unit at GSH and the medical/surgery and rehabilitation units at SJMC, if Cortez had intended to request bargaining over the effects of the new staffing matrix changes on the registered nurses after implementation, she would have done so.

[10] Guinnane testified that staffing matrixes are the primary means by which Respondent determines staffing for the TCU at SJMC and conceded that, for purposes of staffing in the TCU, matrixes are synonymous with staffing.

[11] It is clear that this new staffing matrix was motivated by budget concerns. Thus, Respondent utilizes as a budget factor, a calculation called hours of care per patient day (HPPD). The existing staffing matrix HPPD number was 9.65; while the new matrix figure was 8.5. This latter figure justified a reduced staffing level for the TCU.

[12] Guinnane testified that, under the old matrix, "even though there were LVNs listed there, we would staff with an RN . . . ."

[13] During cross-examination, Guinnane admitted that, under the new staffing matrix, on the day shift, the charge nurse has responsibility for more than two patients only when the patient census is 12, 16, 20, or 24.

the Charge Nurse in Care for a full four (4) patients."[14] The foregoing becomes significant when one considers that the average census in the TCU during the summer of 1997 was 16 and, at the level, the charge nurse had four patients. As to the changes resulting from this increased patient care responsibility in the charge nurse's ability to fulfill her job duties, Guinnane testified that charge nurses "were no longer able to assist when assigning patients to other nurses, [and] we weren't getting a complete charge nurse report from shift to shift . . . we were no longer available as a resource or to help transfer patients to the other units." With regard to the charge nurse as resource person, as they had a regular patient load at numerous census levels, the RN in that capacity could no longer cover for other registered nurses and, thus, permit them to take scheduled breaks and lunches,[15] and, with regard to the latter point, the responsibility for effectuating transfers became that of "the nurse taking care of that patient directly."[16] Further, as "[charge nurses] had more patient care . . . not only did they have all the assessing and things they had to do for the four patients, they also were responsible for all the charge nurse duties." Moreover, according to Guinnane, the increased patient load caused charge nurses to leave the assigning of new patients to the unit clerks.[17] Daugherty did not dispute Guinnane's testimony regarding the changes in a registered nurse's job duties when acting as a charge nurse resulting from having to take four patients at certain census levels. Thus, asked if, by giving the charge nurse four patients, the nurse's ability to help other RNs on the shift was reduced, Daugherty replied, "It could on some occasions . . . it would depend on the acuity of the patients that the charge nurse assigned to herself." She added that, whenever a charge nurse is assigned four patients, the individual "can choose to say I need, because I'm the charge nurse, to only take three patients instead of four, and so I'm going to assign this fourth patient to one of the other nurses on the floor to allow me the availability to be the resource."[18] Daugherty conceded that such would increase the workload of the other RNs on duty in the TCU. There is no dispute that Respondent implemented the new TCU staffing matrix thereby changing the duties and responsibilities of the charge nurse and that it did fail and refuse to bargain with CNA regarding these changes. Further, Respondent does not contest the fact that the changes were material changes in the TCU registered nurses' terms and conditions of employment and that the matters were mandatory subjects of bargaining.

The General Counsel alleges a third change in the TCU registered nurses' terms and conditions of employment about which Respondent allegedly failed and refused to bargain. According to Guinnane, during the summer of 1997, the TCU registered nurses observed a "gradual" increase in the acuity level of patients in their unit. For example, according to the witness, TCU began receiving patients who were "post-stent," patients who were given coil implants in arteries in order to keep the arteries open. Guinnane added that, previously, these patients had gone directly to the ICU and remained there for 24 hours before being transferred to the TCU but that, beginning in that summer, the patients "were coming directly to TCU." The witness further testified that "we also got post open-heart patients 24 hours old" as opposed to "two or three days" after surgery. Guinnane stated that these changes "just came about" without input from the registered nurses. During cross-examination, Guinnane conceded that physicians are responsible for transferring patients from the ICU to the TCU and that, if the doctor does not think that a patient should be moved to the TCU, the patient remains in the ICU. With regard to whether heart patients were, at one time, required to remain in the ICU for 72 hours but, beginning in the summer of 1997, were now being transferred to the TCU after only 24 hours, Daugherty testified that such depends on the patient and the cardiac surgeon's analysis of the patient but "that's a medical standard that has changed over the course of the last two years. . . . It has to do with the amount of time it takes to get them off of a ventilator . . . [and] some of the medications that [were] given in higher doses in times past."[19] During cross-examination, Daugherty conceded that this change in cardiac practice "may in some cases" have meant more "patient care hours" in the TCU but "not necessarily." Finally, Daugherty insisted that the foregoing did not represent a change in the standards for admission to the TCU. In the summer of 1997, while medical experience was showing that the "faster" some heart patients were moved, the "better outcomes," such continued to be based upon the acuity of the individual patient, which must be a case by case determination.

Respondent operates a medical/oncology unit at GSH. According to Diane Lagraffe, a medical/oncology staff RN, who works on the day shift, the unit is a merger of the hospital's oncology department, which deals with cancer patient, and the medical department, which is concerned with all other illnesses, including diabetes. She added that the unit has 33 or 34 beds; that, during

[14] During her cross-examination, Daugherty conceded that the new matrix resulted in a patient ratio change for charge nurses "in certain occasions" but "not always."

[15] Jeanine Daugherty specifically denied observing any increased incidence of nurses failing to take lunch or other breaks after the implementation of the new staffing matrix but conceded that "there's always times when that happens. It's the nature of our work."

[16] When a registered nurse is accompanying a patient for a procedure, such as a treadmill test, another RN becomes responsible for the former's patients, who remain in the TCU.

[17] Guinnane testified extensively regarding the effects of the charge nurse being regularly in care upon the other registered nurses in the TCU. However, the relevancy of the evidence is questionable. Thus, in her June 10 demand letter, Cortez only requested to bargain over Respondent's decision to implement changes. In contrast to other demand letters, she failed to demand bargaining over the effects of the alleged changes in terms and conditions of employment. This was reasonable as implementation had not yet occurred and she could not anticipate any effects. Presumably, if Cortez desired to bargain over the effects of the changes in the TCU registered nurses' terms and conditions of employment, she would have done so subsequent to implementation. She never did so. Accordingly, Cortez should be held to the strict wording of her demand, and I have not, and shall not, consider her request as one to bargain over the effects.

[18] Guinnane admitted understanding that, if she believed the TCU was understaffed, she could go to Daugherty and request a float RN or a temporary transfer.

[19] Asked why cardiac patients are being moved more quickly from the ICU to the TCU, the witness stated that the primary reason was newer anesthesia drugs, which "are shorter acting drugs."

the spring and summer of 1997, the average patient census was approximately the high 20s or low 30s; that, for, at least, 8 or 9 years, a staffing matrix has been used for staffing the department;[20] and that the classifications of employees, who work in the department, are RNs, LVNs, certified nursing assistants, and ward clerks. Diane McNeal is the manager of the medical/oncology department at GSH for Respondent.

In late June or early July 1997, Maria Cortez became aware that Respondent had implemented a new staffing matrix for the medical/oncology department and, as the issues were "important," she sent the following letter, dated July 9 to Fred Bernal:

> Management recently implemented a matrix change in the Medical/Oncology Unit at Good Samaritan Hospital. We are exercising our right to engage in decision and effects bargaining. Please provide the following information in order to prepare for this matter:
>
> 1. Copies of the old and new matrices
> 2. Copy of acuity system used in this unit
> 3. Copy of all overtime hours worked by RN and by shift January 1997 to the present
> 4. Copies of all documents supporting the current patient care hours
> 5. Copies of all schedules from January 1997 to present If I do not hear from you within the next 5-7 working days, CNA will be filing a ULP charge alleging that [Respondent] failed to bargain in good faith.

With regard to the information request, Cortez testified that item 1 was necessary for bargaining as "[I] wanted to see what the old matrix had been and what the new matrix, and the changes between the two." Item 2 was necessary for bargaining "because the matrix had been cut . . . the matrix interacts with the acuity system, so that if you have a really sick patient, the unit is properly staffed to accommodate that, and at this point at [GSH] there was a lot of questions about whether they even used any kind of acuity system . . . when your matrix is cut, it is really important . . . that . . ." the hospital have the "right amount of nurses" to care for the sick patients. As to item 3, according to Cortez, overtime hours were necessary because nurses were subject to discipline for not having their required "documentation" concluded within their 8-hour shifts, "and I wanted to track . . . how serious the overtime usage was" Item 4 was necessary as, for other units, Respondent "didn't have any documentation to support that drop in patient care hours" and the nursing managers could not explain how the numbers were derived. Finally, item 5 was necessary inasmuch as Cortez wished to identify exactly who was working—in particular, "the use of non-regular staff, meaning how many per diem workers [and] . . . registry workers they called in to help fill out the schedule because that brought up the issues of whether people were really qualified to work on the unit."

Respondent admits that it implemented a new staffing matrix for the medical/oncology unit at GSH during the summer of 1997 and that it did so without notice to the CNA or offering to bargain with CNA as the bargaining representative of its registered nurses in the above hospital unit. Further, Respondent does not dispute that the new staffing matrix reduced the number of RNs and other staff on each of the three work shifts at particular census levels. Thus, regarding the RNs, analysis of the old and the new staffing matrixes, General Counsel's Exhibit 2, establishes that, on the day shift, the number of RNs was reduced at patient census levels 15 through 17 and 21 through 23; that, on the p.m. shift, the number of RNs was reduced at patient census levels 15 through 18 and 21 through 34; and that, on the night shift, the number of RNs was reduced at all patient census levels above 20. A direct effect of the reduced numbers of RNs, according to Lagraffe, was that, prior to the matrix change, the registered nurse, who worked as the charge nurse, had no patient care responsibility and, subsequent to the matrix change, the charge nurse "sometimes" had such responsibility in order to ease the patient load on the other registered nurses, who were required to work with fewer LVNs and assistants. Also, when caring for their own patients, the charge nurses were no longer available as a resource person to the other registered nurses.

On July 18, by letter, Fred Bernal responded to Cortez' demand for bargaining and request for information. With regard to the former, Bernal wrote that Respondent's position was ".that it had and has no obligation under the current Collective Bargaining Agreement to bargain over the changes in staffing ratios or staffing mix." With regard to the information request, Bernal wrote that, "because [Respondent] has not duty to bargain over these changes, the Association does not need the information for purposes of bargaining." To date, according to Cortez, CNA has received none of the requested information. Respondent concedes that it failed and refused to provide the requested information to CNA; that its implementation of the new staffing matrix in the medical/oncology unit at GSH represented a material change in the registered nurses' terms and conditions of employment; and that such was, and is, a mandatory subject of bargaining.

At SJMC, Respondent operates a rehabilitation unit, the function of which is "the restoration of general physical function, emotional and social function to patients who've been debilitated by severe injuries or illnesses," such as strokes. According to Mabel Thompson, a registered nurse in the unit, there are 22 beds and the normal patient census level is 10 to 12. Also, at SJMC, Respondent operates a medical/surgery unit, which "takes care of medical patients, which are heart patients, stroke patients, diabetics, patients with pneumonia," and patients with kidney disease. According to registered nurse Sue Ellen Cunningham there are 77 patient beds in this unit of SJMC, with the average patient census level at 40 to 50 people. At the same time, she became aware of the new staffing matrix, which had been implemented for the medical/oncology unit at GSH, Maria Cortez discovered that Respondent had also implemented new staffing matrixes for the rehabilitation and medical/surgery units at SJMC. Thereupon, on July 8, she sent the following letter to Fred Bernal concerning the latter two hospital units:

> Please be advised that [CNA] is exercising its right to engage in decision and effects bargaining over the recently implemented matrix changes in the Rehab and Med-Surg Unit at San Jose Medical Center.

[20] Lagraffe recalled that staffing has historically been accomplished in oncology by means of a staffing matrix and that, years ago, an acuity system was used for staffing the department; however, such was phased out and replaced by a staffing matrix based on patient census.

In preparation for the meeting, please provide the following information:

1. Copies of the old and new matrices
2. If there was reduction in the patient care hours in either unit, the documentation that support the reduction
3. Copies of the current acuity system
4. The patient census for each unit, by shift, from June 1996 to the present
5. Copies of the work schedules for each unit from June 1996 to the present
6. The amount of overtime hours worked for each unit, broken down by RN, by shift, from June 1996 to the present.

According to Cortez, with regard to item 1, she wanted "to be clear about what the change was. . . " and, as to item 2, she desired Respondent to "justify a reduction in staffing." Cortez testified that, regarding item 3, she wanted to know "whether or not the hospital was staffing either strictly by numbers or . . . by acuity," and, regarding item 4, she required the information "to determine not only the average patient census but also to figure out the number of staff that were working per patient." She further stated that item 5 was necessary to determine exactly who worked against who was actually scheduled and usage of nonregular unit personnel and that item 6 was required to determine whether there had been an increase in overtime.

Respondent admits that, in early July 1997, it implemented a new staffing matrix in the SJMC rehabilitation unit[21] and that it did so without affording notice to CNA or affording the labor organization an opportunity to bargain. Further, Respondent does not dispute the fact that the new staffing matrix reduced the number of RNs and other staff working at certain patient census levels. Thus, as to the RNs, on the day shift, the number required at patient census levels 14 through 17 and 21 was reduced. There does not appear to be any record evidence regarding whether their reduced numbers had any direct effect on the terms and conditions of employment of the registered nurses. Rather, according to registered nurse Thompson, the effect of concomitant cuts in the numbers of nursing assistants resulted in the RNs being forced to perform duties, which were regularly performed by the former classification of employees but which RNs had regularly performed in the past. As a result, the rehabilitation unit registered nurses experienced difficulty working at a level equivalent to their mandated patient care standards. Likewise, Respondent admits that, in early July 1997, it implemented a new staffing matrix for the medical/surgery unit at SJMC and that it did so without affording notice to CNA or offering to bargain with the labor organization. Dan Ross, the manager of the medical/surgery unit, admitted that he was an author of the matrix change and that, as a result of the new staffing matrix, "we reduced our staffing numbers" in "all classifications . . . " including registered nurses. Registered nurse Cunningham[22] testified that the reduction in the number of RNs at certain census levels directly affected their working conditions. Thus, registered nurses, who worked as charge nurses, were never assigned patients prior to the new staffing matrix was implemented in July; subsequently, they were placed in patient care "a couple of times a week." Such meant that the charge nurse was required to perform her regular functions and perform all the tasks, which are necessary for proper patient care.

Fred Bernal's letter, dated July 18, to Cortez was in response to the latter's July 8 and 9 letters. As set forth above, Bernal wrote that, based on language in the parties' existing collective-bargaining agreement, Respondent refused to bargain with CNA regarding its implementation of new staffing matrixes for the rehabilitation and medical/surgery units at SJMC and that, as it was not obligated to engage in bargaining, Respondent would not provide the information to CNA, which had been requested by Cortez. CNA has not yet received any of the the information. Respondent concedes that it failed and refused to provide the requested information to CNA; that the implemented new staffing matrixes in the SJMC rehabilitation and medical/surgery units were material changes in the terms and conditions of employment of the registered nurses in the departments; and that the changes constituted mandatory subjects of bargaining.

2. Evidence of the alleged waiver

As described above, while conceding that its implementations of new staffing matrixes and other changes in the terms and conditions of employment of its registered nurses in the above units at the San Jose Medical Center and the Good Samaritan Hospital were accomplished without prior notice to CNA or affording the latter an opportunity to bargain, Respondent argues that, given the negotiated language of the management-rights clause of the parties' existing collective-bargaining agreement, CNA had effectively waived its right to bargain over staffing levels at Respondent's hospitals and, accordingly, that it was under no duty to bargain with CNA regarding its decision to implement new staffing matrixes or their effects.[23] In this regard, the record estab-

[21] Registered nurse Thompson testified that, during her tenure in the rehabilitation unit, staffing has always been accomplished by a staffing matrix.

[22] Asked if her department always staffed by means of a staffing matrix, Cunningham answered, no, stating "after the orthopedic neuro department merged with the surgical department we were staffing by an acuity system that had a time study done on it."

[23] Art. II of the parties' existing collective-bargaining agreement, the management-rights provision, reads, in pertinent part, as follows:

> SECTION 1. IN GENERAL Except as specifically abridged by express provision of this Agreement, nothing herein shall be interpreted as interfering in any way with the Hospital's right to determine and direct the polices, modes, and methods of providing patient care, to decide the number of employees to be assigned to any shift or job, or the equipment to be employed in the performance of such work, to employ registry or traveling nurses when necessary to supplement staffing, to float employees from one working area to another working area within the division in which they are qualified to work, or to determine appropriate staffing levels. Thus, the hospital reserves and retains, solely and exclusively, all of the rights, privileges and prerogatives which it would have in the absence of this Agreement, except to the extent that such rights, privileges and prerogatives are specifically abridged by express provisions of this Agreement. . . .
>
> SECTION 2. ELABORATION OF RIGHTS In expansion rather than in limitation of the foregoing Section A, the Hospital shall have the following unilateral rights: (A) To determine the number, location, and types of facilities; (B) To subcontract any of the work or service; (C) To select, hire, and train employees, and to discipline and discharge

lishes that the management-rights clause of the final collective-bargaining agreement, between CNA and Good Samaritan Health Systems, Inc. was vague and uncomplicated—"GSH retains all the rights, powers, and authority exercised or had by it except as the same may be limited by a specific provision in this Agreement." The aforementioned contract was due to expire on June 30, 1996, and, in January of that year, negotiations on a collective-bargaining agreement commenced between CNA and Respondent as the successor to Good Samaritan Health Systems, Inc. as the owners of Good Samaritan Hospital, San Jose Medical Center, and South Valley Hospital. During the ensuing negotiations,[24] which did not conclude until on or about July 9, 1996, each side was represented by a negotiating committee, with Jeff Bell, an attorney, the chief spokesperson for Respondent and Michael Griffing, the chief spokesperson for CNA. At the initial bargaining session, between the parties, held on January 25, Respondent presented an initial contract proposal, which contained an elaborate management-rights clause proposal, stating:

> Section A. In General
>
> Nothing in this Agreement shall be construed to limit or impair the right of the Hospital to exercise its discretion in determining whom to employ, and nothing in this Agreement shall be interpreted from interfering any way with the Hospital's right to determine and direct the policies, modes, and methods of providing patient care or the Hospital's right to alter, rearrange or change, extend, limit or curtail its services or operations or any part thereof, to decide the number of employees that may be assigned to any shift or job, or the equipment to be employed in the performance of such work, whatever may be the effect upon employment . . . to determine or redetermine job assignments and the division of duties between and within job classifications; to establish or alter working schedules, or to reduce or eliminate staffing from shift to shift when in the sole discretion of the Hospital it may deem it advisable to do all or any of the things. Thus, the Hospital reserves and retains, solely and exclusively, all of the rights, privileges, and prerogatives which it would have in the absence of this Agreement. . . .
>
> Section B. Elaboration of Rights
>
> In expansion rather than limitation of the foregoing section A, the Hospital shall have the following unilateral rights:
>
> B.1. To determine the number, location and types of facilities; . . .
>
> B.5. To determine the size and composition of the work force, including the number of shifts required, and the number of employees assigned to any particular shift or operation; . . .
>
> Section C. Not Subject to Arbitration
>
> The reserved rights of management shall not be subject to the grievance and arbitration provisions of this Agreement nor shall the Hospital be required to bargain with the Association about the Hospital's exercising any of the reserved rights of management during the term of this Agreement . . . .

Bell testified that Griffing's main concern with regard to the management-rights language was "the language in the first sentence of Section C. . . . He saw that . . . as essentially the same thing as a zipper clause. . . . Mike expressed concern . . . that we would be arguably in a position to refuse to bargain over virtually any change that was not specifically addressed . . . in the contract. . . . I told him that certainly was what we were interested in being able to do." Likewise, Griffing testified that CNA objected to the section C language, which made the management rights not subject to the grievance and arbitration procedure and which meant "that we were . . . giving up our right to . . . bargain over wages, hours, and working conditions." He added that he informed Bell that CNA preferred the prior contract's simple management-rights language as opposed to Respondent's more detailed provision. Bell confirmed this, stating that CNA's position "was that the management-rights clause in the prior agreement . . . was what was preferable." The next day, January 26, Respondent presented a more detailed initial contract offer, which included a proposed grievance and arbitration procedure. The provision included a section, entitled Section 5. Limits of Arbitrator, which stated that "the arbitrator would have no power to . . . hear or decide any dispute as to the numbers or classifications of employees needed, at any given time, to provide patient care for the Hospital's patients ." Also, section 3 of article XVIII of this revised initial contract proposal established a professional performance committee, which would be composed of bargaining unit registered nurses and which would act as an advisory body to Respondent's nursing administrators, and a staffing issues committee, composed of RNs and nursing administrators, which would make recommendations to Respondent regarding "staffing issues or concerns."

On February 13, the Union presented its initial contract proposal to Respondent. In accord with Griffing's expressed concerns with Respondent's management-rights proposal, CNA's proposal retained the management-rights language from the existing agreement with Good Samaritan Health Systems, Inc.. CNA's initial proposal also contained a detailed provision, article XIX, entitled Patient Needs Staffing (PSN). The provision, which all parties acknowledge was basically new language, established a professional performance committee, comprised of bargaining unit registered nurses and nursing administrators for Respondent, which would meet to discuss all issues involving patient care and staffing. Specific sections of this proposed provision included a required patient classification system and the factors to be considered and a required staffing plan for each hospital unit and the factors to be considered. Further, the article specified that "disputes [which] arise between the Hospital and the [committee]

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employees for just cause; (D) To adopt, add to, amend, change or rescind any reasonable Hospital work rules.

SECTION 3. NOTICE OF SUBCONTRACTING/DISCONTIN-UANCE OF SERVICE The Hospital agrees to give the union thirty (30) days advance notice . . . of its intention to subcontract any work being performed by bargaining unit employees . . . .

[24] At the same time, Respondent was engaged in bargaining with four other labor organizations, which represented different bargaining units at the three hospitals.

under this Article shall be subject to the grievance and arbitration procedure." There is no dispute that, while eventually almost entirely withdrawn,[25] this proposed contract provision engendered much discussion and disagreement until almost the conclusion of the bargaining. During his direct examination, Griffing was clear that the ability "to grieve and arbitrate staffing issues" was central to the proposed language, and it is equally clear that such was obvious to Respondent. Thus, Bell testified that, when presented by Griffing,"we did not have a lot of questions . . . about the meaning of the article. It was pretty self explanatory. . . . Mike continued to suggest that this was very important to the [CNA] . . . . We . . . just the we absolutely were not interested in this at all." Griffing responded "that we shouldn't be concerned particularly about the import of [the article] because in some respects there are other requirements that also might apply to our staffing obligations . . . " such as State law. According to Bell, he rejected this argument, stating, to Griffing, on April 24, that CNA's article XIX was merely an attempt to inhibit Respondent's right to determine staffing and, on several occasions, that "the right to determine how we staff the hospital we felt was one of the most important management rights that we had . . . historically we had determined how we would staff the hospital, and we were not going to agree to . . . language . . . [resulting] in the hospital not being able to decide how its going to staff."[26] Griffing could not recall Bell ever making the latter comments.[27]

Attorney Bell testified that Respondent's proposed management-rights language was gradually modified during the course of the bargaining in "several incremental revisions." Thus, at a bargaining session on April 23, in an effort to be more "concise" and in response to Griffing's complaint that Respondent's proposal was too "wordy," Respondent proposed modified management-rights language—in section A, eliminating "whatever may be the effect upon employment" and changing the staffing language to read "or to reduce staffing" and, in section B, eliminating five provisions including B.5, the language concerning Respondent's right to determine the size and composition of its work force.[28] Later, during the same bargaining session, CNA presented Respondent with a handwritten management-rights clause counter-offer, one which, unlike the labor organization's initial proposal, specified certain rights of management.[29] It read: CNA agrees that, except to the extent that these rights are abridged by the contract, the following constitute management rights:

(1) To determine the number, location, and types of facilities;
(2) To determine the services to be performed
(3) To lay off nurses;
(4) To select, hire, and train nurses;
(5) To discipline and discharge nurses for just cause;
(6) To direct the working force;
(7) To adopt, add, amend, change or rescind any reasonable Hospital work rules;
(8) To utilize registry nurses to supplement the current work force but not to replace CNA members;
(9) To float nurses from one working area to another working area in which they are qualified to work

The next day, CNA submitted a revision to its above counter-offer on management rights, changing the introduction to state, "[Respondent] retains all the rights, powers, and authority exercised or had by it except as the same may be limited by a specific provision in this Agreement which includes the following." Asked if there was any discussion on CNA's management rights counter-proposal, Bell stated, "I told Mike that I was more concerned with the language that wasn't in there than I was concerned with the language that was . . . . Because it didn't specifically address staffing and the hospital's right to determine staffing." Bell recalled that, with regard to the April 24 revision, Griffing the CNA was offering it so that "we're not limiting your management rights just to this . . . so its not being exclusive, so you don't have to worry about . . . your staffing stuff."[30] Bell testified that he rejected the proposal as it failed to "deal, with sufficient specificity," with any of the items which were important to Respondent.

The parties held another bargaining session on May 28, and, at the meeting, Respondent presented, to CNA, a revised management-rights clause proposal, which, according to attorney Bell, was designed "to meet [CNA's] concern that this was too wordy. We didn't need all this language" and to alleviate CNA's "concern about a management-rights clause that would foreclose bargaining over anything for the term of the agreement." Three aspects of this new proposal are of significance to the issues involved in the instant matters. Thus, in section A, Respondent deleted the opening phrase, "Nothing in this Agreement shall be construed to limit or impair the right of the Hospital to exercise its discretion in determining whom to employ," and, for the first time, included the

[25] Apparently, what language remained of this proposal was incorporated in the staffing issues committee language, which appears in the parties' final agreement.

[26] The accuracy of Bell's assertion is questionable. Thus, registered nurse, Melinda Markowitz, who has been the chief nurse representative for the Union at GSH since 1986, testified that, in 1995, Good Samaritan Health Systems, Inc. notified CNA that it was going to unilaterally implement a new staffing matrix for the surgical-ortho-neuro unit at GSH. In response, CNA threatened to file a grievance and an unfair labor practice charge. Without conceding its right to act unilaterally, the employer withdrew the new staffing matrix. Also, rehabilitation unit registered nurse Thompson described a 1995 matrix change, which SJMC officials discussed with a CNA representative prior to implementation.

[27] Two weeks later, CNA made another contract proposal, which reiterated the language of its February 13 proposal.

[28] While unable to recall the discussion concerning the deletion of the B.5 language, Griffing specifically denied that Bell or any other management representative the that Respondent continued to retain the right to unilaterally change a staffing matrix or increase the registered nurses' workloads.

[29] Apparently, the language of CNA's proposal was identical to an oral proposal on management rights, which Griffing made at a bargaining session on April 3.

[30] Bell recalled that, during the April 3 bargaining session, after he complained to Griffing that the latter's enumerated management rights did not refer to the number of employees to be assigned to a shift or to a job, Griffing responded that the number of employees assigned to a shift is a management right "but you have to understand that they wanted to challenge that if they think it's necessary. At this time they still had their patient needs staffing proposal which dealt with the arbitrability of these . . . issues." Bell added that Griffing "was clearly taking the position that [CNA] wanted to have the right to grieve and be in a position to object to staffing. . . ."

staffing language, which appears in the existing collective-bargaining agreement—the words, "or to reduce staffing, when in the sole discretion of the Hospital it may deem it advisable to do all or any of the things," which had been proposed on April 23, were deleted and, in their stead, were inserted the words, "or to determine appropriate staffing levels."[31] Finally, Respondent's new proposal deleted the opening bargaining waiver language from section C—"The reserved rights of management shall not be subject to the grievance and arbitration provisions of this Agreement nor shall the Hospital be required to bargain with the [CNA] about the Hospital's exercising any of the reserved rights of management during the term of this Agreement. . . ." There is no record evidence that, at this or at any subsequent meeting, the parties ever discussed the meaning of the phrase, "or to determine appropriate staffing levels" or that attorney Bell ever stated that, although the bargaining waiver language had been withdrawn, the waiver continued to be applicable to the management rights enumerated in section A. Asked if Griffing asked any questions about any aspect of this new management rights proposal, Bell replied, "I don't believe he did." During his direct examination, while he could not recall what Bell may have the regarding the changes in its management rights language, Griffing testified that his understanding was that Respondent had relinquished its right to unilaterally impose those rights set forth in section A. Further, during cross-examination, Bell asserted that Respondent was able to delete the last phrase, the bargaining waiver language, as other "zipper" language remained viable in its contract proposal. However, when closely examined, Bell later conceded that no such "zipper" language existed.[32] Finally, also during the May 28 bargaining session, CNA presented an offer to Respondent pursuant to which the former agreed to delete the language from its proposed PNS article, whereby disputes under the article would be subject to the collective-bargaining agreement's grievance and arbitration procedure, and to accept Respondent's proposed grievance and arbitration procedure language in return for Respondent's acceptance of CNA's April 24 management rights proposal and of the following provision: "No addition to, alteration, modification . . . or waiver of any term, provision, covenant, or condition or restriction in this Agreement shall be valid, binding, or of any force or effect unless made in writing and executed by [Respondent and CNA]."

The parties held another bargaining session 2 days later on May 30. At this meeting, CNA submitted an offer, which was similar to its May 28 proposal, to Respondent. In its proposal, CNA sought Respondent's agreement to an attached management-rights provision; what was significant about the offer is that the proposed language was essentially sections A and B of Respondent's own May 28 management-rights proposal with handwritten deletions and additions. Specifically, in section A, a new opening phrase, "Except as specifically abridged by provision of this Agreement," was added, the provision, "to assign or reassign work stations," was deleted, and the words, "based on patient acuity levels" were added to the end of the management right "to determine appropriate staffing levels," and, in section B, the subcontracting provision was deleted and the word, transfer, was deleted from the next management right. Later, during that session, Respondent counterproposed its May 28 management-rights provision, incorporating some of CNA's proposed additions and deletions but not the "based on patient acuity levels" addition to the staffing language of section A. On this point, while Griffing could recall no such discussion, Bell testified that he told Griffing Respondent wanted no restrictions on staffing; that the latter replied that the patient acuity language was necessary to inform its members that the state regulations, which require acute care hospitals to staff by acuity, were being followed;[33] and that he (Bell) responded "that's fine . . . not this Agreement."

The management-rights language again was discussed during the parties' June 19, July 1, and July 2 bargaining sessions. Thus, at the start of the June 19 meeting, CNA submitted a proposal, which, while continuing to include the "based on patient acuity levels" language in section A, accepted Respondent's May 28 section C language. Additionally, CNA accepted Respondent's proposed grievance and arbitration provision section, which included the language, "The arbitrator shall have no power to . . . hear or decide any dispute as to the numbers or classifications of employees needed at any given time . . . ." Bell rejected the counter-proposal, but, later, in the bargaining session, Respondent submitted its own management rights counter-proposal to CNA. As on May 30, it incorporated some of CNA's proposed wording but not the patient acuity language. Griffing asked what Respondent's problem with acuity was; the latter "simply reiterated that we saw this as another attempt to limit [Respondent's] . . . right . . . . to determine how we would staff. And I didn't want to be getting into arguments over acuity levels in staffing. . . ." On July 1, CNA submitted another counter-proposal, on management rights, to Respondent. The proposal did not include the controversial patient acuity language in section A, and the parties reached final agreement on the entire management-rights clause language, which appears in the existing contract, on July 2.[34]

With regard to the bargaining which accompanied the above-described contract proposals, Respondent makes two contentions—that its spokesperson and attorney Bell continually stressed that Respondent viewed its right to make staffing decisions as an historical one and was not inclined to relinquish it and that CNA always understood that the management right to determine appropriate staffing levels entailed the implementation of revised staffing matrixes when necessary. As to the former, according to Bell, whenever the subject of management rights arose during the bar-

[31] According to attorney Bell, the staffing language "was not language from [CNA]. . . . We proposed it," and it was not derived from the bargaining."

[32] Bell insisted he did tell Griffing that, based on Respondent's grievance and arbitration procedure language, "we are continuing to hold to our proposal on the limits of the arbitrator's power to decide disputes about the number of employees needed." However, he conceded "I didn't say the word bargaining."

[33] Griffing testified that the language was designed to make it clear to the bargaining unit employees that, in accord with the state regulations, acuity had to be considered in determining appropriate staffing levels.

[34] Final agreement on a collective-bargaining agreement was reached on July 9. With regard to the CNA's patient needs staffing proposal, the record establishes that, despite attorney Bell's assertion that it continued to push the proposal until the end, as of its July 1 proposals to Respondent, the CNA had withdrawn numerous objectionable elements of its original proposal, including grievance and arbitration language and the staffing factors section.

gaining, "I always told Mr. Griffing . . . that we were intending to retain our right to determine staffing at the hospital and to make that abundantly clear by specific reference to that issue rather than simply relying on the more general language that [CNA] had proposed in management rights." In particular, according to Bell, on May 30, when CNA proposed "that we add the phrase based on patient acuity levels. . . . we rejected the proposed addition . . . stating we didn't want anything in here that would suggest in any way . . . a limitation of the hospital's right to determine staffing levels, and I expressed to [Griffing] I was concerned about what the phrase would do . . . that needed to say we had the right to determine staffing period."[35] As to the accuracy of Bell's assertion that he "repeatedly" maintained Respondent's historical right to determine staffing levels, while the CNA's spokesperson Griffing could not recall Bell making the statement that Respondent would not accept language, which limited its right to determine appropriate staffing levels,[36] Respondent's own bargaining notes have Bell making such a statement on just two occasions—the bargaining sessions on April 23 and May 15, 1996, and, in this regard, I note that, as of May 15, Respondent continued to insist upon a waiver of bargaining language in section C o its manage-fent rights proposal. As to Respondent's contention that the CNA always was aware that the management right to determine appropriate staffing levels entailed the right to implement new staffing matrixes, at the outset, there is no record evidence that, subsequent to Respondent's May 28 management rights proposal, when, for the first time, it included the "to determine appropriate staffing levels" language in section A, the parties ever discussed the meaning of the the phrase; that the parties ever used the term, staffing matrix, in connection with it; or that any management representative ever stated that staffing matrixes should be considered as being synonymous with staffing. Nevertheless, according to Bell, the CNA's negotiating committee clearly understood that Respondent determined staffing levels by use of matrixes. He testified that, in the discussion of the "drop days" contract provision, a registered nurse member of the CNA bargaining committee raised a "complaint" that Respondent was "staffing too fat" and "dropping people too frequently," with the existing matrixes calling for certain numbers of registered nurses and some being sent home. Bell was corroborated by Julie Clayton, the child services manager for GSH, who testified that, during a bargaining session, registered nurse, Melinda Markowitz, commented that, in her hospital unit, "they staffed by using a staffing matrix." The foregoing was uncontroverted, and Griffing claimed not recall whether the words, staffing matrix, were ever used during the bargaining.[37]

Finally, Bell and Griffing were closely examined regarding the distinction, if any, between those management rights set forth in section 1 of the existing management-rights clause and those in section 2. Bell stated that there is no difference and placed no significance on the word "unilateral" in sction 2. In this regard, he stated, "just as the words solely and exclusively which are in number one and aren't in number two, there's no significance to that to distinguish those rights from the rights addressed above." He added that "Section 2 was simply another way of describing . . . the types of management rights and naming some specific ones additionally. . . ." When asked why, then, have two separate sections, Bell replied "because . . . if . . . the language in section 1 had been whittled down to general language without any specific reference, we would still have some specific reference to items *that were important to us* in section 2, but there's no distinction between the legal import of [the two sections]. This is an elaboration rather than in limitation . . . . it does not distinguish these rights from these rights." (Emphasis added.) Of course, Griffing, who stated that the issue was never a topic for discussion, took an opposite approach. He conceded that, unlike those rights set forth in Section 1, the word "unilateral," set forth in section 2, means that the enumerated rights are rights which may be implemented without bargaining. As to whether any bargaining waiver attached to the management rights set forth in section 1, Griffing was adamant that "we maintained our right to bargain over wages, hours, and working conditions." However, with regard to the Section 1 management right to float a nurse from one area to another and whether Respondent must give notice to the CNA each time it does so, Griffing conceded that what "we would be looking at bargaining over would have more to do with policy than day to day decisions like that" and that, on a day-to-day basis, Respondent would not be required to give the CNA advance notice or an opportunity to bargain."

B. Legal Analysis

The Supreme Court and the Board have long held that an employer violates its duty to bargain, pursuant to Section 8(a)(1) and

[35] Asked if he was aware how the hospitals' prior owners accomplished staffing before Respondent drafted its management rights language on staffing, Bell conceded that he did not know the entire history of the staffing systems, utilized by the three hospitals. Nevertheless, he testified that the did know that the hospital had employed staffing matrixes in the past and had changed staffing levels and that "in talking with my bargaining team, I was aware . . . of . . . the hospitals' practice . . . with respect to staffing historically . . . they had always determined staffing" on a unilateral basis. However, as stated above, according to registered nurse, Melinda Markowitz, the chief nurse representative for CNA at GSH, in 1995, the hospital notified CNA of its decision to implement a new staffing matrix for its surgical-ortho-neuro unit. During the course of correspondence over the matter, CNA objected to the matrix change and threatened to file grievances and unfair labor practice charges. Markowitz testified that, eventually, "they changed it. They changed it back to what we had prior."

[36] Griffing testified that, although he could not recall any management representative claiming a unilateral right to determine staffing levels, such an assertion would have been tantamount to waiving a red flag at a bull and would have provoked an immediate, negative response. He also testified, without contradiction, that there was no discussion regarding whether Section 1 of the agreed-upon management rights language permitted Respondent to unilaterally change staffing matrixes or to unilaterally increase work loads.

[37] While Bell stated that "a staffing matrix reflects a staffing level based on census, Griffing testified, without contradiction, that, while staffing matrixes are the primary way in which hospitals staff, "they don't always do it using a staffing matrix." He added that matrixes are just "one" method to determine staffing levels; hospitals may do so on an ad hoc, day-to-day basis or by patient acuity levels. While the mother-baby unit at GSH, utilizes patient acuity as a factor in determining staffing, the record evidence is that patient census levels are the predominant basis for the staffing matrixes in the various units at Respondent's three hospitals, including the aforementioned mother-baby unit.

(5) of the Act, by, during the term of a collective-bargaining agreement, without affording notice to its employees' bargaining representative and affording it an opportunity to bargain over the decision and the effects, implementing changes in its bargaining unit employees' terms and conditions of employment absent the agreement of the bargaining representative, an impasse in negotiations, or a waiver by the bargaining representative. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994); *Bituminous Roadways of Colorado*, 314 NLRB 1010, 1013 (1994); *Gratiot Community Hospital*, 312 NLRB 1075, 1080 (1993); and *GTE Automotive Electric*, 240 NLRB 297, 298 (1979). Based on Respondent's admissions in its answer to the consolidated complaint, it is clear that counsel for the Acting General Counsel has established prima facie violations of Section 8(a)(1) and (5) of the Act. Thus, with regard to the mother-baby unit at GSH, Respondent admits that, in June 1997, without notice to the CNA, it unilaterally implemented a new staffing matrix for the employees, including the registered nurses, in the unit, which matrix change reduced the required number of RNs at specified patient census levels on all work shifts; that the new staffing matrix represented a material change in the terms and conditions of employment of the RNs, who work in the mother-baby unit at GSH and was a mandatory subject of bargaining; that the CNA demanded to bargain over its decision to implement this new staffing matrix; and that it failed and refused to honor the CNA's demand to bargain. With regard to the transitional care unit at SJMC, Respondent admits that, in June 1997, without notice to the CNA, it unilaterally implemented a new staffing matrix for its employees, including the registered nurses, in the department and changed the job duties and responsibilities of its RNs, who work as charge nurses in the the hospital unit; that the new staffing matrix reduced the number of RNs at specified patient census levels on the day shift; that the new staffing matrix for the TCU and the changed duties and responsibilities of its charge nurses in the TCU represented material changes in the terms and conditions of employment for its registered nurses in the TCU and were mandatory subjects of bargaining; that the CNA demanded to bargain over its decisions to implement this new staffing matrix and to change the duties and responsibilities of the charge nurses; and that it failed and refused to honor the CNA's demand to bargain. With regard to the medical/oncology unit at GSH, Respondent admits that, during the summer of 1997, without notice to the CNA, it unilaterally implemented a new staffing matrix for its employees, including the registered nurses, in the unit, which matrix change reduced the required number of RNs at specified patient census levels on all work shifts and an effect of which was to change the duties and responsibilities of the unit's RNs, who worked as charge nurses; that the new staffing matrix for the medical/oncology department represented a material change in the terms and conditions of employment of the RNs in the department and was a mandatory subject of bargaining; that the CNA demanded that it bargain over the decision and effects of the implementation of this new staffing matrix; and that Respondent failed and refused to honor the CNA's demand for bargaining. With regard to the medical/surgery and rehabilitation units at SJMC, Respondent admits that, in early July 1997, without notice to the CNA, it unilaterally implemented a new staffing matrix for the employees, including the registered nurses, in the medical/surgery unit and a new staffing matrix for the employees, including the registered nurses, in the rehabilitation unit; that the change in the medical/surgery unit's staffing matrix reduced the required number of RNs and that the change in the rehabilitation unit's staffing matrix reduced the required number of RNs at specified patient census levels on the day shift; that an effect of the reduced number of required RNs in the medical/surgery unit was to change the duties and responsibilities of RNs, who work as charge nurses, in the department; that the new staffing matrixes in the rehabilitation and medical/surgery units represented material changes in the terms and conditions of employment for the registered nurses in the departments and were mandatory subjects of bargaining; that the CNA demanded that it bargain over the decision and effects of the implementation of the new staffing matrixes in the rehabilitation and medical/surgery units; and that it has failed and refused to honor the CNA's demand for bargaining.

It has also long been established Supreme Court and Board law that, generally, an employer is under a statutory obligation, upon request, to provide a labor organization, which is the collective-bargaining representative of the employer's employees, with information, which is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956); *Aerospace Corp.*, 314 NLRB 100, 103 (1994); *Howard University*, 290 NLRB 1006 (1988). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for the administration of a collective-bargaining agreement, including information required by a labor organization to process a grievance, and for effects bargaining. *Acme Industrial*, supra; *Bacardi Corp.*, 296 NLRB 1220 (1989); and *Challenge-Cook Bros.,* 282 NLRB 21, 28 (1986). The standard for relevancy is a "liberal discovery-type standard," and the sought-after evidence need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Aerospace Corp*., supra; *Bacardi Corp*., supra; *Pfizer, Inc*., 268 NLRB 916 (1984). *Further*, information, which concerns the terms and conditions of employment of the bargaining unit employees, is deemed "so intrinsic to the core of the employer-employee relationship" that such is held to be presumptively relevant. *York International Corp*., 290 NLRB 438 (1988), quoting *Southwestern Bell Telephone Co*., 173 NLRB 172 (1968); *Buffalo Concrete***,** 276 NLRB 839 (1985). However, information, which does not concern the terms and conditions of bargaining unit employees, is not presumptively relevant, and the labor organization "must therefore demonstrate the relevance of such information." *Maple View Manor, Inc.*, 320 NLRB 1149, 1151 fn. 2 (1996); *Miami Rivet of Puerto Rico*, 318 NLRB 769 (1995). Besides the above, Respondent admits that, with regard to its GSH medical/oncology unit bargaining demand, the CNA requested that Respondent furnish certain information to the CNA in order to enable the latter to "prepare" for bargaining; that, with regard to its SJMC rehabilitation unit and medical/surgery unit bargaining demands, the CNA requested that Respondent furnish it with information to assist in "preparation" for bargaining; and that it failed and refused to provide the requested information to the

CNA. Regarding both requests for information, while Respondent denied that the requested information was relevant and while the requested information herein does not appear to be presumptively relevant, the CNA representative, Maria Cortez, testified as to the specific relevancy and necessity, for bargaining purposes, of each aspect of her two requests. For example, with regard to the GSH medical/oncology unit request, she testified that overtime hours information was relevant for the purpose of bargaining as a perceived effect of the new matrix was an inability of charge nurses, who were regularly assigned patients, to ease the patient load on the registered nurses, thus impairing the latter's ability to complete all their required "documentation" in the eight hours of their normal work shifts. Therefore, "I wanted to track . . . how serious the overtime usage was . . . ." Respondent offered no evidence controverting Cortez' testimony as to the relevancy for bargaining of the requested information, and I note that Respondent's defense to the allegations that it engaged in violations of Section 8(a)(1) and (5) of the Act by failing and refusing to provide the requested information to the CNA, rather than attacking the relevancy of the requests, ties Respondent's acts and conduct to its contention that it was under no statutory obligation to bargain with the CNA over the alleged unilateral changes.

Respondent argues that it was under no obligation to bargain with the CNA prior to the implementation of any of the staffing matrixes at issue herein or over the change in the duties and responsibilities of the registered nurses, who act as charge nurses in the transitional care unit at SJMC, inasmuch as "the [CNA] waived its right to bargain over these changes when it negotiated the [1996 through 1999] collective-bargaining agreement with the [Respondent]." Specifically, counsel for Respondent contends that "the Management Rights provision of the collective-bargaining agreement . . . permits [Respondent] to determine staffing levels, which are synonymous with staffing matrixes, and constitutes clear and unmistakable waiver by the [CNA] of its right to demand bargaining over the subject." Initially, there is no dispute as to the relevant legal principles in cases of asserted waivers. Thus, the Board has long recognized that the burden of proof is on the party asserting the existence of waiver—in this case, Respondent. *58* York*, 301 NLRB 822, 824 (1991); *East Kentucky Paving Corp*., 293 NLRB 1132, 1135 (1989). Moreover, waiver may be manifested by the written terms of a collective-bargaining agreement (*Armour & Co*.), 280 NLRB 824, 828 (1986)), and, in such a manner, "a union may waive a member's statutorily protected rights . . . ." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). However, when, as herein, such a right is involved, the Supreme Court "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is `explicitly stated.' More succinctly, the waiver must be clear and unmistakable." 460 U.S. at 708. In evaluating whether language of management-rights clauses, such as herein involved, constitutes a clear and unmistakable waiver, as the parties recognize, the Board has held that it will examine the precise wording of the relevant contractual provision and that "management-right clauses [which] are couched in general terms and [which] make no reference to any particular subject area will not be construed as waivers of statutory bargaining rights." *Bozeman Deconess Hospital*, 322 NLRB 1107, 1108 (1997); *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995); *Dubuque Packing Co*., 303 NLRB 386, 397 (1991); and *Johnson-Bateman Co.,* 295 NLRB 180, 184 (1989). Further, "a waiver may also be inferred from extrinsic evidence of contract negotiations . . ." but "only if the matter at issue has been fully discussed and consciously explored during negotiations and the [labor organization] has consciously yielded or clearly and unmistakably waived its interest in the matter." *Ohio Power Co.,* 317 NLRB 135, 136 (1995); *KIRO, Inc.,* supra at 1328. Finally, the critical issue in deciding if management-rights clause language constitutes a waiver "is not . . . whether [a statutory] right might reasonably be inferred from the management-rights clause; it is whether that interpretation is supported by `clear and unmistakable' language." *Elliot Turbomachinery Co.*, 320 NLRB 1, 2 (1995). *Owens-Brockway Plastic Products*, 311 NLRB 519, 525 (1993); *Universal Security Instruments*, 250 NLRB 661, 662 (1980).

Applying the above principles to the management-rights clause of the parties' existing collective-bargaining agreement, it was Respondent's burden to prove that, by the language of the clause, the CNA waived its right to bargain over the implementation of new, changed staffing matrixes and over the implementation of changes in the duties and responsibilities of registered nurses, who act as charge nurses, pursuant to the implementation of a changed staffing matrix. As set forth above, section 1 of the management-rights clause of the parties' existing collective-bargaining agreement, reads as follows:

> Except as specifically abridged by express provision of this Agreement, nothing herein shall be interpreted as interfering in any way with the Hospital's right to determine and direct the policies, modes and methods of providing patient care, to decide the number of employees that may be assigned to any shift or job, or the equipment to be employed in the performance of such work, to employ registry or traveling nurses when necessary to supplement staffing, to float employees from one working area to another working area within their division in which they are qualified to work, or to determine appropriate staffing levels. Thus, the Hospital reserves and retains, solely and exclusively, all of the rights, privileges and prerogatives which it would have in absence of this Agreement, except to the extent that such rights, privileges and prerogatives are specifically abridged by express provision of this Agreement. [Emphasis added.]

Clearly, nothing in the above-quoted language expressly reserves for Respondent the management rights to unilaterally change staffing matrixes or to unilaterally change the duties and responsibilities of registered nurses, who act as charge nurses. Hence, one must determine whether the language of the management-rights clause, by necessary implication, reserves these rights to Respondent (*New York Mirror*, 151 NLRB 834, 839–40 (1965)), and, in this regard, counsel for Respondent argues, and I agree, that implementing changed staffing matrixes, which determine the number of registered nurses necessary at every patient census level, clearly falls within the plain meaning of the phrases, "to decide the number of employees to be assigned to any shift or job" and "to determine appropriate

staffing levels."[38] Thus, in his May 27, 1997 memorandum to Respondent's employees at each of its three hospitals, Respondent's president referred to on-going changes in staffing matrixes throughout the "clinical and nonclinical" areas at the hospitals. Moreover, counsel for Respondent points out that, as several witnesses testified, staffing matrixes are synonymous with staffing in the medical/oncology, mother-baby, critical care, and child services units at GSH and the TCU, medical/surgery, rehabilitation, and child services units at SJMC and staffing matrixes have been utilized for staffing in various units in the hospitals for many years. Further, Michael Griffing, CNA's chief spokesperson during the bargaining, conceded that use of staffing matrixes is the primary method for determining staffing levels in the healthcare industry. Finally, while there is no record evidence that, during the contract negotiations, anyone used the term, staffing matrix, during discussions concerning section 1 of the management-rights clause or that any management representative stated that staffing matrixes were covered by the language of section 1, I think that there is record evidence warranting the conclusion that, during the bargaining, the CNA representatives understood that the above Section 1 phrases covered staffing matrixes. On this point, it was uncontroverted that staffing matrixes were discussed in other contexts. Also, on May 30, the CNA proposed that the words, "based on patient acuity levels" be added after the phrase,"to determine appropriate staffing levels," in Respondent's May 28 management rights proposal. In the latter regard, I do not believe that Michael Griffing, who appeared to be a disingenuous witness,[39] was candid in asserting to Respondent that the proposed addition was merely designed to assure CNA members that Respondent's management right was in accord with state regulations. Rather, I think that, given the historic usage of staffing matrixes by Respondent and in light of the CNA's threatened unfair labor practice charges and grievances over Respondent's predecessor's attempted unilateral implementation of a new staffing matrix in the surgical/ortho/neuro unit at GSH the previous year, the CNA spokesperson consciously attempted to limit the proposed management right to determine appropriate staffing levels to the use of acuity-based systems and that, therefore, Griffing and the entire CNA negotiating committee understood that, unless modified, Respondent's Section 1 management rights to decide the number of employees that may be assigned to any shift or job and to determine appropriate staffing levels encompassed implementation of new staffing matrixes, the prevalent mechanism for carrying out the the Section 1 management rights.[40]

Having concluded that then implementation of staffing matrixes is encompassed by the language of section 1 of the existing collective-bargaining agreement's management-rights clause, the issue remains as to whether that section of the management-rights clause operates as a clear and unmistakable waiver of the CNA's right to demand bargaining whenever Respondent implements a new staffing matrix.[41] In my view, it does not. In this regard, I initially note that, as does section 1, section 2 of the management-rights clause also specifies certain management rights but that, unlike section 1, the prefatory phrase to Section 2 contains the words, "unilateral rights." The fact these words appear in the opening sentence of the latter section and not in section 1 not only is, of course, resonant of legal consequence but also must be accorded factual significance here. Thus, I believe that, by including the identical words in the second section of each of its management rights proposals, Respondent signified to CNA its intent that each of the section 2 enumerated management rights be understood, by the CNA, as a right, which Respondent deemed of paramount importance to its operations, and as one over which there existed no obligation to bargain. That Respondent sought to privilege the section 2 management rights is clear as, in the midst of patently belabored testimony, regarding an asserted lack of distinction between the sections 1 and 2 management rights, attorney, Jeff Bell,[42] conceded that the section 2 management rights were the subjects "important to us." Further, Michael Griffing understood the foregoing, acknowledging that, given the language, the CNA had waived its right to bargain over the section 2 management rights. Nevertheless, counsel for Respondent makes two arguments against a conclusion that there existed a difference between the management rights, set forth in sections 1 and 2.[43] First, he asserts that Griffing conceded the CNA had waived bargaining over Respondent's section 1 management right to float a nurse from one work area to another. However, close scrutiny of Griffing's testimony on that point establishes that the CNA

[38] No such argument is advanced for changing the job duties and responsibilities of registered nurses, who act as charge nurses, and I find that nothing in sec. 1 of the management-rights clause encompasses such a supposed right.

[39] Griffing did not impress me as being an entirely truthful witness and believe his continued inability to recall masked a desire not to concede certain adverse facts about the bargaining.

[40] Assuming, arguendo, that counsel for the CNA is correct that the record evidence of the usage of staffing matrixes at Respondent's hospitals only encompassed 36 percent of the licensed beds, neither counsel for the Acting General Counsel nor counsel for the CNA offered any evidence that would lead one to the conclusion that staffing matrixes are not used in the other units of the hospitals. Moreover, I need not, and do not, decide that the term staffing matrix is synonymous with staffing but, rather, that staffing matrixes are encompassed by the phrase, "to determine appropriate staffing levels." Surely, by drafting a staffing matrix, Respondent is making a determination of the appropriate staffing level necessary in a given hospital unit. Neither counsel for the Acting General Counsel nor counsel for the CNA has offered a contrary interpretation. Finally, the fact that there may be other methods used for staffing is not the point; I find only that staffing matrixes, by necessary implication, are covered by the language of sec. 1.

[41] Neither counsel for the Acting General Counsel nor counsel for the CNA dispute that, by the language of the grievance and arbitration procedure, the CNA has waived its right to file contractual grievances over implementation of a new, changed staffing matrix by Respondent.

[42] While appearing to be a more candid witness than Michael Griffing, Bell did not impress me as being entirely candid as to all points. Thus, I believe that, with regard to points particularly critical to Respondent's position, Bell deliberately testified in a manner designed to bolster his client's legal position.

[43] I have carefully considered the cases, which counsel cites in support of his contentions, and note that each concerns whether the subject of the alleged unilateral change is encompassed by the management-rights clause at issue. Herein, I agree with counsel to the extent that implementation of staffing matrixes seems to be encompassed within the wording of sec. 1 of the management-rights clause at issue here. However, such does not end our inquiry into the legality of Respondent's acts and conduct.

waived bargaining over a hospital's daily, routine decisions to float nurses but not over Respondent's operating principle or policy in that regard. Next, he argues that variations of the two provisions had always been parts of Respondent's management-rights proposals, and Respondent would not have proposed a limitation on its rights especially as part of its initial proposal. But, as will be discussed below, the originally proposed section C included bargaining waiver language, which was applicable to both of the preceding sections. Finally, at the very least, as in *Elliot Turbomachinery Co.*, 320 NLRB 141 (1995), the existence of two sections to the management-rights clause, with each setting forth specified rights of management but with one categorizing the enumerated rights as "unilateral" ones, creates two plausible alternatives—either both section 1 and section 2 permit Respondent to act unilaterally or, given that the section 2 rights are specified as unilateral ones, only with regard to the rights has the CNA consciously waived its right to bargain prior to implementation. Id. at 142.[44] Accordingly, I believe that, viewing the management-rights clause as a whole, the wording of section 1 of the parties' existing management-rights clause does not support a view that, by agreeing to the section 1 management rights, the CNA "clearly and unmistakably" waived its right to bargain whenever Respondent implements a new or changed staffing matrix for one of its hospitals' units.

Likewise, analysis of the parties' negotiations over the management-rights language fails to demonstrate that the CNA waived its right to bargain over Respondent's implementation of new staffing matrixes or to clarify the aforementioned ambiguity. Thus, there is no dispute that, after Respondent's initial proposal of management rights language, the CNA's concerns were that, given the language of the proposed Section C, it would be waiving its right to demand bargaining over unilateral changes and the right to file grievances. Moreover, the matter of staffing was enough of a concern to the CNA that, according to attorney Bell, he continually insisted that Respondent would never relinquish its historic right to unilaterally determine staffing. Then, on April 23, among various other claimed management rights, Respondent eliminated the language, "To determine the size and composition of the work force, including the number of shifts required and the number of employees assigned to any particular shift or operation," from the claimed "unilateral rights" of section B of its management rights proposal, the section which contained the management rights most "important" to Respondent, and, on May 28, in what clearly constituted a significant concession to the CNA, eliminated the waiver of bargaining over Respondent's exercising of any of its reserved rights language from section C of the contract provision. In particular, Respondent's withdrawal of the section C language gave Griffing the impression that Respondent was no longer insisting that it had, or retained, the unilateral right to implement any of the specified management rights, at least as set forth in the first section of the management-rights clause, and, while Jeff Bell may have insisted that the section A management rights were exempted from the grievance and arbitration procedure, he never used the term bargaining and or any other words to dissuade Griffing from his above view of the management-rights clause. In these circumstances, rather than supporting a view of bargaining waiver, nothing in the management rights bargaining history establishes that the CNA clearly and unmistakably waived its right to bargain over the implementation of new and changed staffing matrixes. *Delta Tube & Fabricating Corp.*, 323 NLRB 856, 857 (1997); *Lincoln Child Center*, 307 NLRB 288, 316 (1992).

Accordingly, in agreement with counsel for the Acting General Counsel and counsel for the CNA, I find that the management-rights clause of the parties' existing collective-bargaining agreement does not constitutes a clear and unmistakable waiver of the CNA's right to bargain with regard to Respondent's implementation of new staffing matrixes in units of its hospitals. Therefore, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act, by, without notice to the CNA, unilaterally implementing new staffing matrixes, thereby reducing the numbers of registered nurses required at certain census levels on certain work shifts, in the mother-baby and medical/oncology departments at Good Samaritan Hospital and in the transitional care, rehabilitation, and medical/surgery units at San Jose Medical Center, and by refusing to bargain with the CNA concerning implementation of the new staffing matrixes.[45] Further, inasmuch as Respondent has offered no evidence—and, indeed, there is no record evidence to support such a finding—that the language of the management-rights clause of the parties' existing collective-bargaining agreement either directly or by necessary implication encompasses a management right to unilaterally change the duties and responsibilities of the registered nurses, who act as charge nurses, and, as there exists no record evidence that, during the bargaining for the management-rights clause, the parties ever discussed or contemplated that, by the language of the management-rights clause, the CNA would waive its right to bargain before Respondent implemented such a material change, I conclude that Respondent also engaged in conduct violative of Section 8(a)(1) and (5) of the Act, by unilaterally, without notice to or bargaining with the CNA, changing the job duties and responsibilities of the registered nurses, who work as charge nurses in the transitional care unit at

[44] Under the latter possibility, the management rights in sec. 1 may only be exempted from the contract's grievance and arbitration procedure, a point which Bell emphasized during the pivotal May 28 bargaining session.

[45] With regard to the mother-baby unit at GSH, Cortez demanded to bargain only over the decision to implement a new staffing matrix, and I, therefore, recommend dismissal the allegation that Respondent also violated the Act by failing and refusing to bargain over the effects of its implementation of a new staffing matrix. Likewise, with regard to the transitional care unit at SJMC, as Cortez demanded to bargain only over the decision to implement certain unilateral changes, I shall recommend dismissal the allegation that Respondent also violated the Act by failing and refusing to bargain over the effects of its unilateral changes in the unit. Regarding the rehabilitation unit at SJMC, as there was no evidence as to any effects of the implementation of the new staffing matrix on the registered nurses in that hospital unit, I find that Respondent did not fail and refuse to bargain over such and shall recommend dismissal of the allegation. Finally, with regard to the medical/oncology unit at GSH and the medical/surgery unit at SJMC, as the record evidence established that an effect of the staffing matrix changes on the registered nurses in the units was to increase the job duties and responsibilities of the charge nurses, as Cortez demanded to bargain over the decision and effects of the matrix changes, and as Respondent failed and refused to do so, its refusal to bargain pertains to the decision and effects of its unilateral matrix change.

SJMC. *Bozeman Deaconess Hospital,* supra; *Ohio Power Co*., 317 NLRB 135, 136 (1995).[46]

Turning to the unlawful failure and refusal to provide information consolidated complaint allegations, Respondent's defense appears to have been based on its defense to the above-described unlawful unilateral change allegations—that, as the CNA had waived its right to bargain over the alleged unlawful implementation of new staffing matrixes, Respondent has been under no duty to provide the CNA with the requested information, which was sought for the purpose of bargaining over the implementation of the new staffing matrixes. However, as set forth above, I have concluded that Respondent acted unlawfully by unilaterally implementing new staffing matrixes in various hospital units. Accordingly, as, based on Maria Cortez' candid testimony regarding why the requested material was relevant for purposes of bargaining, I believe that the CNA has established a "probability that the desired information was relevant, and that it would be of use to the {CNA] in carrying out its statutory duties and responsibilities," (*Acme Industrial Co.,* supra at 437), I find that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act, by failing and refusing to provide to the CNA the requested information, regarding the medical/oncology unit at GSH and the rehabilitation and medical/surgery units at SJMC. *KIRO, Inc.,* supra, at 1328.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The CNA is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the CNA has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, for the following appropriate unit of Respondent's employees:

> All regularly scheduled full-time and regularly scheduled part-time Registered Nurses, including Skilled Nursing Facility nurses, and endoscopy nurses; excluding admitting, in-service, utilization review, infection control, enterostomal therapy, cardiac catheterization laboratory, diabetic education coordinator, respiratory therapy nurses, radiation therapy nurses and stroke coordinator nurses, quality assurance, employee health, RNs who are employed and perform 75% of their time on functions directly related to the cardiology department, all other guards and (except as herein provided) supervisors as defined in the [Act]

4. The CNA is the exclusive collective-bargaining representative of all the employees in the above appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. In June 1997, by, without notice to the CNA, unilaterally implementing a new staffing matrix, which reduced the number of registered nurses who are scheduled to work at specified patient census levels on each work shift, for its employees in its mother-baby unit at GSH and by refusing to bargain with the CNA over its decision, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

6. In June 1997, by, without notice to the CNA, unilaterally implementing a new staffing matrix, which reduced the number of registered nurses who are scheduled to work at specified patient census levels on the day shift, for its employees in the transitional care unit at SJMC, by unilaterally changing the job duties and responsibilities of its registered nurses, who work as charge nurses in the hospital unit, and by refusing to bargain with the CNA over its decisions, Respondent engaged in acts and conduct violative of Section 8(1) and (5) of the Act.

7. During the summer of 1997, by, without notice to the CNA, unilaterally implementing a new staffing matrix, which reduced the number of registered nurses who are scheduled to work at specified patient census levels on each work shift, for its employees in the medical/oncology unit at GSH and by refusing to bargain with the CNA over the decision and its effects, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

8. In July 1997, by, without notice to the CNA, unilaterally implementing a new staffing matrix, which reduced the number of registered nurses who are scheduled to work at specified patient census levels on the day shift, for its employees in the rehabilitation unit at SJMC and by refusing to bargain with the CNA over the decision, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

9. In July 1997, by, without notice to the CNA, implementing a new staffing matrix, which reduced the number of registered nurses who are scheduled to work, for its employees in the medical/surgery unit at SJMC and by refusing to bargain with the CNA over the decision and its effects, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

10. By failing and refusing to furnish to the CNA certain information including copies of old and new staffing matrixes, the acuity system used in the unit, overtime records, patient care hours documentation, and work schedules, which information was necessary for preparing for bargaining, pertaining to the medical/oncology unit at GSH, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

11. By failing and refusing to furnish to the CNA certain information including copies of old and new staffing matrixes, documentation supporting a reduction in patient care hours, current acuity systems, patient census documents, work schedules, and overtime documents, which information was necessary for preparing for bargaining, pertaining to the medical/surgery and rehabilitation units at SJMC, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

12. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Unless specified above, Respondent engaged in no other unfair labor practices.

[46] Assuming, at SJMC, that cardiac care patients are being transferred to the transitional care unit from the intensive care unit at a more rapid rate than in the past, in agreement with counsel for Respondent, I do not believe that such arises to an unlawful unilateral change by Respondent. Thus, while the record does establish that patients are being transferred to the TCU after shorter stays in the ICU, such appears to be the result of medical advances and improved drugs. Moreover, decisions to move patients to the TCU are those of the physicians in charge and not some manifestation of a unilaterally implemented hospital policy Accordingly, I find no merit to this consolidated complaint allegation and shall recommend dismissal of such.

REMEDY

I have found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, and, therefore, I shall recommend that it cease and desist therefrom and that it take certain affirmative actions designed to effectuate the policies of the Act. With regard to each of Respondent's hospital units at issue herein, I shall recommend that Respondent be ordered to rescind the staffing matrix, which it implemented in June or July 1997, insofar as the new staffing matrix reduced the numbers of registered nurses scheduled to work at specified patient census levels on the three work shifts.[47] Further, I shall recommend that Respondent be ordered, if it determines the necessity to implement new staffing matrixes for any of the hospital units at issue herein, which new staffing matrixes change the numbers of registered nurses scheduled to work at specified census levels on the three work shifts, or to implement any other changes in the registered nurses' terms and conditions of employment, to afford prior notice to the CNA and provide the CNA with the opportunity to bargain over the changes. Finally,[48] Respondent shall be required to post a notice, defining its obligations herein.

On these findings of fact and conclusions of law and on the entire record herein, I issue the following recommended:[49]

ORDER

The Respondent, Natomi Hospitals of California, Inc., d/b/a Good Samaritan Hospital, San Jose Medical Center, and South Valley Hospital, San Jose, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing new staffing matrixes for employees in the mother-baby and medical/oncology units at Good Samaritan Hospital and the transitional care, rehabilitation, and medical/surgery units at San Jose Medical Center, which staffing matrixes reduce the number of registered nurses, who are scheduled to work at specified patient census levels on each work shift, or any other changes in the terms and conditions of employment of the registered nurses in the the hospital units without giving prior notice to the CNA and affording the CNA an opportunity to bargain as the collective-bargaining representative of the following employees:

> All regularly scheduled full-time and regularly scheduled part-time registered nurses, including skilled nursing facility nurses, and endoscopy nurses; excluding admitting, in-service, utilization review, infection control, enterostomal therapy, cardiac catheterization, laboratory, diabetic education coordinator, respiratory therapy nurses, radiation therapy nurses and stroke coordinator nurses, quality assurance, employee health, RNs who are employed and perform 75% of their time on functions directly related to the cardiology department, all other guards and (except as herein provided) supervisors as defined in the Act

(b) Failing and refusing to furnish the CNA with documents, which are necessary and relevant for the purpose of preparing for bargaining regarding Respondent's decision to implement new staffing matrixes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions to effectuate the policies of the Act.

(a) Rescind the staffing matrixes which were implemented in the mother-baby and medical/oncology units at Good Samaritan Hospital in June and July 1997 insofar as the staffing matrixes reduced the numbers of registered nurses, who were scheduled to work at specified patient census levels on each work shift.

(b) Rescind the staffing matrixes which were implemented in the transitional care, rehabilitation, and medical/surgery units at San Jose Medical Center during the summer of 1997 insofar as the staffing matrixes reduced the numbers of registered nurses, who were scheduled to work at specified patient census levels on each work shift.

(c) Rescind the changes, which were implemented concomitantly with the implementation of the new staffing matrix in June or July 1997, in the job duties and responsibilities of the registered nurses, who act as charge nurses, in the transitional care unit at San Jose Medical Center.

(d) Notify and give the CNA a prior opportunity to bargain about any changes in the terms and conditions of employment of registered nurses, who are employed at Respondent's above-named three hospitals in the San Jose, California area, including, but not limited to, the implementation of new staffing matrixes for employees, including the registered nurses.

(e) Within 14 days after service by the Region, post at its above-named three hospitals in San Jose, California, copies of the attached notice marked "Appendix."[50] Copies of the notice, on forms provided by the Regional Director of Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and main-

[47] Counsel for the Acting General Counsel requests that I recommend an order which would rescind the entire staffing matrix for each unit and restore the status quo ante for both bargaining unit and non-bargaining unit employees on grounds that the staffing matrixes affect all employees. However, she has cited no case support for such an order, and I have been unable to find any Board decision, requiring such a broad remedy. In this regard, I note that the CNA does not represent any employees but registered nurses and no unfair labor practice allegations are before me with regard to any employees except the registered nurses. In effect, counsel requests that I issue a remedial order in the absence of an unfair labor practice complaint for employees, who are not represented by the CNA. I do not believe that I am empowered to issue such a broad-based.

[48] I shall not require Respondent to provide any of the requested information to the CNA. Thus, Respondent has been ordered to rescind each of its new staffing matrixes at issue herein. As the information, at issue, was requested for bargaining purposes and as there remains nothing about which to bargain, requiring Respondent to transmit the requested information would serve no purpose.

[49] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[50] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 11, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 32 a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

Dated at San Francisco, California May 4, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT implement new staffing matrixes for employees in the mother-baby and medical/oncology units at Good Samaritan Hospital and the transitional care, rehabilitation, and medical/surgery units at San Jose Medical Center, which staffing matrixes reduce the number of registered nurses, who are scheduled to work at specified patient census levels on each work shift, or any other changes in the terms and conditions of employment of the registered nurses in the hospital units without giving prior notice to the California Nursing Association (CNA) and affording the CNA an opportunity to bargain as the collective-bargaining representative of the following employees:

> All regularly scheduled full-time and regularly scheduled part-time registered nurses, including skilled nursing facility nurses, and endoscopy nurses; excluding admitting, in-service, utilization review, infection control, enterostomal therapy, cardiac catheterization, laboratory, diabetic education coordinator, respiratory therapy nurses, radiation therapy nurses, and stroke coordinator nurses, quality assurance, employee health, RNs who are employed and perform 75% of their time on functions directly related to the cardiology department, all other guards and (except as herein provided) supervisors as defined in the Act.

WE WILL NOT fail and refuse to furnish the CNA with documents, which are necessary and relevant for the purpose of bargaining regarding our decisions to implement new staffing matrixes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the staffing matrixes which were implemented in the mother-baby and medical/oncology units at Good Samaritan Hospital in June and July 1997 and in the transitional care, rehabilitation, and medical/surgery units at San Jose Medical Center during the summer of 1997 insofar as the staffing matrixes reduced the numbers of registered nurses, who were scheduled to work at specified patient census levels on each work shift.

WE WILL rescind the changes, which were implemented concomitantly with the implementation of the new staffing matrix in June or July 1997, in the job duties and responsibilities of registered nurses, who act as charge nurses, in the transitional care unit at San Jose Medical Center.

WE WILL notify and give the CNA a prior opportunity to bargain about any changes in the terms and conditions of employment of registered nurses, who are employed at Good Samaritan Hospital, at San Jose Medical Center, and at South Valley Hospital, including, but not limited to, the implementation of new staffing matrixes fort employees, including the registered nurses.

NATOMI HOSPITALS OF CALIFORNIA, INC., d/b/a GOOD SAMARITAN HOSPITAL, SAN JOSE MEDICAL /CENTER, AND SOUTH VALLEY HOSPITAL